88-1970

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BURNING TREE CLUB, INC., *et al.*,
Petitioners

v.

STATE OF MARYLAND, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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QUESTIONS PRESENTED

This petition presents the following questions under the United States Constitution:

1. Whether Chapter 334 of the Laws of Maryland, 1986, violates the right of association of the members of Burning Tree Club, a small, private, non-commercial, highly selective and close-knit golf club that has existed virtually unchanged for 67 years, by imposing upon the club a multi-million-dollar tax penalty solely because the members exercise their right of association by limiting the membership to men?

2. Whether Chaper 334 violates the Contract Clause by abrogating, without compensation, a 50-year contract under which Burning Tree has committed itself to provide open space to the State of Maryland by not selling or developing its property, in exchange for the deferral of a portion of the property taxes that would otherwise be payable, in circumstances where the abrogation of the contract will not materially advance any state interest, and the only state interest allegedly advanced by the abrogation was fully known by the State when it entered into the contract and has not changed since that time?

3. Whether the State's requirement that Burning Tree change its membership policies as a condition of retaining the contract constitutes a taking under the principles of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), because the condition does not advance the interest served by the statutory scheme under which the club qualifies for the contract?

PARTIES

The original defendants in this action, the respondents here, were the State of Maryland, its Governor, Harry R. Hughes, its Attorney General, Stephen H. Sachs, and the Maryland State Department of Assessments and Tax-

ation. Governor Hughes and Attorney General Sachs have left office since the action was filed. The petitioners are Burning Tree Club, Inc., and two of its members, Stephen B. Clarkson and William Geoghegan. Burning Tree has no parents, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

The petitioners, Burning Tree Club, Inc., Stephen B. Clarkson and William Geoghegan, respectfully request that a writ of certiorari issue to review the decision of the Court of Appeals of Maryland entered in this case on March 8, 1989.

OPINIONS BELOW

The opinion of the Circuit Court of Anne Arundel County, Maryland was issued on July 21, 1987, and is printed in the appendix at pages 55a through 89a. The opinion of the Court of Appeals of Maryland, affirming the Circuit Court opinion in part and reversing it in part, was issued on March 8, 1989, and is printed in the appendix at pages 1a through 54a.[1]

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[1] The appendix, which is bound separately from this petition, also contains three uncontroverted affidavits by members of Burning Tree that form much of the record in this case. The appendix will be cited herein by reference to the specific page at which the cited material is found, *e.g.*, p. 19a.

JURISDICTIONAL GROUNDS

The decision of the Court of Appeals upheld Chapter 334 of the Laws of Maryland, 1986, against the petitioners' claims under the Federal Constitution that that law violated their right of freedom of association and their rights under the Takings Clause of the Fifth Amendment and the Contract Clause. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257. This petition is being docketed in this Court within 90 days of the denial of the petitioners' claims by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the First, Fifth and Fourteenth Amendments and the Contract Clause of the United States Constitution, which provide in pertinent part:

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Contract Clause—Article I, § 10, Clause 1:

> No state shall . . . pass any . . . Law impairing the obligation of Contracts . . . .

This case also involves §§ 8-213 *et seq.* of the Tax-Property Article of the Maryland Code, as amended by Chapter 334 of the Laws of Maryland, 1986. Those provisions are set forth verbatim in the appendix at pages 90a through 93a.

STATEMENT

A. The Petitioners

The petitioners are Burning Tree Club, Inc. ("Burning Tree") and two of its members, William Geoghegan and Stephen B. Clarkson. Burning Tree has been in existence as a men's golf club since 1922 (p. 95a). It owns approximately 225 acres of land in Bethesda, Maryland, on which it operates an 18-hole golf course (p. 107a). Since the club's founding, its by-laws have restricted its membership to 250 residents of the Washington, D.C. area, and an equal number of non-resident members from the rest of the world (*Id.*).[2] The club also has a small number of honorary, senior and clerical members (*Id.*).

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[2] At present, there is considerably less than a full complement of non-resident members (p. 72a).

B. Proceedings Below

In 1965, the Maryland General Assembly enacted a statute aimed at preserving open spaces in rapidly urbanizing areas of Maryland. The statute was designed to relieve, in part, the financial pressure on country clubs to sell out to developers. *See Burning Tree Club v. Bainum*, 305 Md. 53, 56-57, 501 A.2d 817, 818-819 (1985). It authorized the Maryland State Department of Assessments and Taxation to enter into written contracts with country clubs. The contracts would reduce a club's property taxes in return for the club's commitment to the State that its golf course would remain undeveloped open space, and thereby benefit the surrounding community and reduce expenses for services such as schools and fire protection. The contracts were to be for a minimum period of 10 years, and could be extended. Md. Tax-Property Code Ann. §§ 8-213 *et seq.* (pp. 90a-93a). The amount by which a club's taxes were reduced was deferred, but not forgiven. The deferred taxes would be payable retroactively for up to ten years if the club sold or developed its property during either the term of the contract *or* a ten-year period *after* the termination of the contract. Md. Tax-Property Code Ann. § 8-216 (pp. 92a-93a).

Burning Tree, like many other Maryland country clubs, entered into an open space contract with the State in 1965. That contract was for 10 years (p. 2a). It was extended for an additional 10 years in 1975. In 1981 Burning Tree and the State entered into a new 50-year contract that reduced Burning Tree's property taxes through 2031 in return for the club's commitment not to sell or develop its property during that period (pp. 3a, 95a-96a, 101a-102a).

The contract is not a subsidy to the club, but an exchange in which the State receives full value. By entering into the contract, Burning Tree agreed to further a State policy by giving up its right to sell or develop its property. The State agreed to tax the property at a lower

rate, in recognition that its value to Burning Tree was reduced by the club's relinquishment of its enormously valuable right to sell or develop the property. That exchange is a bargain for the State. The cost of actually acquiring Burning Tree's land for park space would be at least $23 million, according to a tax assessment several years old (p. 96a), while the cost of preserving the open space under the contract is at present about $300,000 per year in deferred taxes (p. 78a). The club's membership policy is irrelevant to that bargain. In no way, therefore, is Maryland, by entering into an open space contract, "subsidizing" discrimination.

This lawsuit arose when the General Assembly, in 1986, amended the open space statute in Chapter 334 of the General Laws of Maryland for one purpose: to destroy the State's contract obligation to Burning Tree, and thereby impose a drastic increase in Burning Tree's property taxes unless the club changed its membership policy by admitting women as members (pp. 11a, 61a, 103a-104a).[3] When the State's tax authorities, acting

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[3] The open space statute had been amended in 1974 to disqualify from eligibility for tax deferral contracts clubs that discriminated on the basis of race, color, creed, national origin or sex, with two provisos. Those provisos provided that a club formed for the benefit of only one sex, or a club that restricted use of its facilities to one or the other sex from time to time, would not be considered to discriminate on the basis of sex. Burning Tree was in 1974 and remains today the only Maryland country club formed for the benefit of only one sex. In 1985, the Maryland Court of Appeals ruled that the proviso for clubs formed for the benefit of one sex violated the Maryland Equal Rights Amendment, Article 46 of the Maryland Declaration of Rights, which was adopted in 1972, but that that proviso was not severable from the general prohibition of sex discrimination in the 1974 amendment to the open space statute. *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985). The result of that decision was that Burning Tree's 1981 contract remained valid, as the open space statute contained no prohibition against sex discrimination after the Court of Appeals' decision. Chapter 334 reinstated the prohibition against sex discrimination and the proviso for clubs that restricted use of their facilities to one sex from time to time, but without the proviso for

under Chapter 334, attempted to impose the higher property taxes, Burning Tree and two of its members sued the State, the Governor, Maryland's Attorney General, and the State's tax authorities, alleging that Chapter 334 was invalid on state grounds and also that it violated the members' First Amendment right of association and the Contract Clause of the United States Constitution (pp. 4a-5a).

On July 21, 1987, the Circuit Court of Anne Arundel County, Maryland, on cross-motions for summary judgment, ruled in Burning Tree's favor on one of the state-law grounds,[4] but rejected Burning Tree's other arguments, including its federal constitutional claims (pp. 55a-89a). The court concluded that under *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), "Burning Tree is a private club that is entitled to protection of its First Amendment right to freedom of intimate association" (p. 75a), but went on to conclude that "the State is in no way interfering with the club members' rights of association" (p. 77a). In response to Burning Tree's contention that Chapter 334 violated the Contract Clause, the court concluded that abrogation of Burning Tree's contract was reasonable and necessary to serve an important public purpose, in that only by abrogating the contract could the

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a club formed for the benefit of one sex. The effect of Chapter 334 —recognized by the Maryland courts and acknowledged by the Maryland legislature to be the purpose of the statute (pp. 11a, 61a, 103a-104a)—was to invalidate Burning Tree's contract unless the club admitted women.

[4] The Circuit Court accepted Burning Tree's contention that the proviso in Chapter 334 for clubs that restricted use of their facilities to one sex from time to time violated the Maryland E.R.A. and was not severable from the general prohibition of sex discrimination (pp. 80a-89a). The net result was the same as in *Burning Tree Club v. Bainum*, discussed in footnote 3: Burning Tree's contract remained valid.

State remove itself from affirmative involvement in discriminatory practices (p. 69a).

Both Burning Tree and the State appealed the decision to the Maryland Court of Special Appeals (p. 6a). The Court of Appeals granted certiorari prior to decision in the Court of Special Appeals (*Id.*). On March 8, 1989, the Court of Appeals reversed the Circuit Court's decision in favor of Burning Tree on the state-law ground on which the club had prevailed below,[5] and affirmed the Circuit Court's rejection of Burning Tree's other state claims[6] and its federal constitutional claims (pp. 1a-54a).

After reviewing *Roberts* and *Rotary Club*, the Court of Appeals assumed that Burning Tree was a more intimate organization than the associations involved in those cases and that it would be constitutionally protected from certain types of regulation that could be imposed on those associations (p. 28a). It held, however, that the burden imposed on the right of intimate association of Burning Tree's members by Chapter 334 was not so great as to be unconstitutional (*Id.*). The Court of Appeals also rejected Burning Tree's contention, based on *Speiser v. Randall*, 357 U.S. 513 (1958), that withdrawal of the tax deferral was an unconstitutional penalty for its members' exercise of their right of association. First, the Court of Appeals asserted, withdrawal of the deferral did not "disadvantage" Burning Tree, because "the tax

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[5] The Court of Appeals agreed with the Circuit Court that the proviso for clubs that restricted use of their facilities to one sex from time to time violated the E.R.A., but held, in contrast to its decision in *Burning Tree Club v. Bainum*, and over a strong dissent, that the proviso was severable from the general prohibition of sex discrimination in Chapter 334 (pp. 35a-36a).

[6] Burning Tree had contended that Chapter 334 was not intended to affect existing contracts, and that because it was aimed at Burning Tree alone it was a "special law" in violation of the Maryland Constitution.

benefit which Burning Tree enjoys is not generally available to comparable landowners" (p. 32a). Second, the Court of Appeals considered the case analogous not to *Speiser* but to *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), in that the State was simply withdrawing its "subsidy" of Burning Tree's members' exercise of the right of freedom of association (pp. 32a-33a). As to the Contract Clause, the Court of Appeals held that abrogation of the contract was reasonable and necessary "to remove the imprimatur of the State from sex discrimination" (p. 16a).

Burning Tree also contended before the Court of Appeals, in its first filing on the merits after *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), was decided, that under *Nollan* the State's actions violated the Federal Constitution. *See* fn. 16, *infra*. The Court of Appeals did not address that contention.

REASONS FOR GRANTING THE WRIT

This petition presents an opportunity for this Court to address, in a vastly different context, the issues it began to explore in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, —— U.S. ——, 108 S. Ct. 2225 (1988). It is important that the Court do so, because Burning Tree epitomizes thousands of intimate all-male and all-female clubs and other groups that have long flourished in this society.

The case also permits the Court to clarify and emphasize the distinction between the line of cases exemplified by *Speiser v. Randall*, 357 U.S. 513 (1958), and the line exemplified by *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The importance of the Court's doing so is evidenced by the total confusion in the courts below of the separate principles represented in the two lines of precedent.

This case also squarely presents the question whether a state may justify an abrogation of its own financial contract with a private party on the basis of an asserted state policy that existed when the state entered into the contract and has not changed in the interim.

Finally, this case allows the Court to affirm that under its decision in *Nollan v. California Coastal Comm'n* a state may not take private property rights by conditioning access to public programs upon undertakings that are unrelated to legitimate statutory goals.

I. THIS CASE RAISES UNRESOLVED AND RECURRING ISSUES ARISING FROM GOVERNMENTAL ATTEMPTS TO REGULATE PRIVATE ENTITIES WHOSE MEMBERS EXERCISE THE RIGHT OF ASSOCIATION.

A. Burning Tree Is an Expression of Its Members' Right of Association that Is Fully Protected by the Constitution.

In three cases during the past five years, this Court has begun the process of balancing the governmental interest in eradicating public sex discrimination against the fundamental constitutional right of Americans to form and preserve "certain kinds of highly personal relationships," *Roberts v. United States Jaycees*, 468 U.S. at 618, that are characterized primarily by their selectivity. In two of those cases, *Roberts* and *Rotary Club*, the Court concluded that the male members of "large and basically unselective groups," *Roberts*, 468 U.S. at 621; *cf. Rotary Club*, 481 U.S. at 546-547, could not claim constitutional protection against state efforts to ensure equality of opportunity for women. In the third, *New York State Club Ass'n v. City of New York*, the Court rejected a facial challenge to an antidiscrimination provision brought by a consortium that included some large organizations that were not dissimilar from those involved in the previous two cases. *See* —— U.S. ——,

108 S. Ct. at 2233.[7] In all three cases, a state was asserting a broad interest in eradicating discrimination against all women in public life in the state, while the organizations seeking to exclude women, which were essentially engaged in commercial or business activity, exhibited few, if any, indicia of the "highly personal relationships" that merit constitutional protection. Those cases have established one end of the spectrum, where a state's interest in eradicating public sex discrimination outweighs the claim of a single-sex organization's members to a right to exclude members of the other sex. This case, in which Maryland has enacted a statute targeted at one private, intimate, non-commercial club, offers the Court an opportunity to mark the other end of the spectrum.

The relevant factors that determine whether an organization receives constitutional protection include "size, purpose, policies, selectivity, congeniality," *Roberts*, 468 U.S. at 620, and "whether others are excluded from critical aspects of the relationship." *Rotary Club*, 481 U.S. at 546. On every factor the members of Burning Tree are engaged in a far more "highly personal relationship" than were the members of any of the organizations in the earlier cases.

Burning Tree has changed hardly at all in its 67-year existence. The hallmark of its membership is selectivity

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[7] *New York State Club Ass'n* does not affect directly the validity of Burning Tree's claims in this case. That decision involved a facial overbreadth attack on a law that, the appellant conceded, could be constitutionally applied to some of its members. —— U.S. at ——, 108 S. Ct. at 2233. The Court's decision rejecting the facial challenge emphasized that the record contained no evidence of specific clubs as to which the law would impair the right of association, and that individual clubs would still be entitled to judicial review of the application of the law to them. —— U.S. at ——, 108 S. Ct. at 2234-35. In this case, there is a full and undisputed record documenting the potentially disastrous effects of the application of Chapter 334 upon the petitioners' right of association, and the club is pursuing the very avenue of judicial review suggested by this Court in *New York State Club Ass'n*.

designed to ensure congeniality. The purpose of its membership selection process is to ensure a "highly selective membership," and a club "formed of a congenial group of men, devoted solely to the game of golf" (p. 106a). No one can apply for membership; every candidate must be proposed by one member and seconded by at least one other. The proposer and seconder must attest to the club's Board of Governors about the candidate's devotion to golf, how long he has lived in the area, how long each has known him and who else in the club knows him. Before action is taken the club's procedures allow time "to permit each member of the club to make inquiries of the proposer and seconder, make efforts to meet the candidate if he is unknown, and make comments to the Board of Governors about the candidate" (pp. 73a, 106a-108a). The Board's vote on a candidate is confidential and the decisive criterion, in addition to the candidate's devotion to golf, is "the man's compatibility with the Club's members" (p. 108a). The process of proposing and selecting a new member typically takes at least a year (*Id.*). This process is intended "to ensure a congenial atmosphere conducive to the pure enjoyment of the game of golf" (p. 106a).

Many more men are proposed than are admitted, even though members tend to "propose only candidates whom they believe merit serious consideration . . . ." Usually only 10 to 15 new resident members are admitted in a year. Since there are 250 resident members, admission of 15 new members means that fully 94 percent of the resident membership remains constant from one year to the next (pp. 73a, 108a).

Another criterion expressed in *Rotary Club* is "whether others are excluded from critical aspects of the relationship." 481 U.S. at 546. The exclusion of outsiders is another hallmark of Burning Tree. The club owns the land on which its facilities are located, and the members completely govern themselves. No dances, weddings or

other social events are held at the club. No business or professional societies are allowed to meet there. No one is allowed to play golf there except as the guest of a member, who must personally accompany his guest. The guest policies even restrict severely the ability of any one non-member to be a frequent guest (pp. 106a-109a). The club attempts to avoid publicity; in fact, there is no sign at the club's only entrance.

The club's purposes are narrow. The club's bylaws state that "[t]he Club is organized and shall be operated exclusively for pleasure, recreation and nonprofit purposes, and more specifically to promote and encourage the game of golf." There is a strict policy, of which every new member is informed in writing, against the discussion of business matters on the premises (pp. 106a-107a). Burning Tree bears no resemblance to downtown eating clubs that mix social and business purposes. The members see the club as a sanctuary from the commercial world (p. 111a). The facilities consist of only a golf course and a simple clubhouse—no swimming pool, no tennis court, not even a horseshoe pit (p. 107a). In short, Burning Tree is a club formed and maintained by a small group of men who have created an atmosphere of fellowship based upon their congeniality and a collective devotion to golf. If any club is truly private, Burning Tree is. If any club's members exercise a constitutionally protected right of association, its members do.[8]

The Court of Appeals eventually assumed that Burning Tree was a "more intimate organization" than the Jaycees or Rotary, and that the State could not intrude upon its members' associational choices to the same degree as in the case of those organizations (p. 28a). The Court of Appeals also recognized, but could not decide,

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[8] Burning Tree has been expressly found by the State, after investigation, *not* to discriminate on the basis of race, creed, color or national origin. *See Burning Tree Club v. Bainum*, 305 Md. at 59, 501 A.2d at 820.

two critical questions, potentially affecting a wide spectrum of Americans, arising from this Court's previous decisions: whether the right of intimate association ever can extend beyond the family, and, if so, exactly what role the size of an organization plays in determining the constitutional protection afforded to its members' right of association. This case provides this Court its best opportunity to provide definitive answers to those questions.

In *Rotary Club*, this Court noted that it has "not held that constitutional protection is restricted to relationships among family members." 481 U.S. at 545. On the other hand, as the Court of Appeals noted (p. 23a), this Court also has never actually held that the constitutional right of association does extend beyond familial relationships. In *Roberts*, the Court referred to the attributes of family relationships in delineating those characteristics—"relative smallness," a "high degree of selectivity," and "seclusion from others in critical aspects of the relationship"—that would suggest "some relevant limitations on the relationships that might be entitled to this constitutional protection." 468 U.S. at 619. As the Court of Appeals noted (p. 26a), this Court's reference to the family in *Roberts*, and the absence of a Supreme Court case holding that the constitutional protection extends beyond the family, has resulted in a general reluctance of lower courts to recognize protection for intimate association outside the family. *See, e.g., Concord Rod and Gun Club, Inc. v. Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 524 N.E. 2d 1364 (1988). Commentators remain divided on whether, and if so how far, the protection should extend to non-familial relationships. *Compare* Marshall, *Discrimination and the Right of Association*, 81 Nw.U.L. Rev. 68 (1986) *with* Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878 (1984).

None of the trilogy of recent cases—*Roberts*, *Rotary Club*, and *New York State Club Ass'n*—presented a close

enough question to require the Court to undertake the delicate exploration of how the right of intimate association applies outside the family that might provide clear guidance to lower courts. This case will require such an exploration: the trial court, applying criteria from *Roberts* and *Rotary Club*, found that the members of Burning Tree *did* enjoy a right of intimate association,[9] and the Court of Appeals could not reach a conclusion on that issue.

The source of the difficulty in the courts below is that this case involves fundamental societal interests. Burning Tree epitomizes the traditional single-sex social clubs, devoted to a single purpose, that have contributed greatly to the diversity, pluralism, and freedom of Americans. While there is a vast gulf between the Jaycees and Burning Tree, it is only a small step—if any step at all—from Burning Tree to a Wednesday bridge club. Even before its recent trilogy of cases, this Court recognized "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." *Evans v. Newton*, 382 U.S. 296, 298 (1966). In *Gilmore v. Montgomery*, 417 U.S. 556, 575 (1974), the Court was explicit about the implications of such constitutional protection, stating that:

> [t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established.

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[9] The trial court, after reviewing the characteristics of Burning Tree against the criteria of *Roberts* and *Rotary Club*, concluded that

> [w]hile it is difficult to determine exactly where, on a continuum from the most "intimate to the most attenuated of personal attachments" a particular group lies, this Court is convinced that Burning Tree is a private club that is entitled to protection of its First Amendment right of freedom of intimate association (p. 75a).

> Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Id. (citation omitted) (*quoting Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas and Marshall, JJ., dissenting)).[10]

This case also provides an opportunity for the Court to clarify how an organization's size affects its members' right of intimate association. The Court has tended to treat the number of members as a sterile statistic. For example, in *New York State Club Ass'n*, the Court noted that some of the clubs within the appellant consortium contained "at least 400 members," comparable to the size of the local Jaycees chapters in *Roberts* and significantly larger than many of the local clubs in *Rotary Club*. —— U.S. at ——, 108 S. Ct. at 2233. Such head-counting masks the relevant question whether an organization seeks to be selective and exclusive in its membership (like Burning Tree) or instead to be expansive and inclusive while discriminating against particular categories of persons (like the Jaycees and Rotary Clubs). The better approach to the criterion of size would be to determine whether an organization has sought to remain as small as reasonably possible considering the purpose for which its members have chosen to band together. Under that approach, Burning Tree's size of 250 resident members will be seen in its true light—as an indication of privacy and selectivity. The purpose of Burning Tree

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[10] The Court has expressly noted that it has not yet addressed the issues raised by this case. It stated in *Rotary Club* that "we have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." 481 U.S. at 547-548, n.6. In *Evans v. Newton*, however, the Court foresaw the principle being asserted by Burning Tree, expressly stating that "[a] private golf club . . . restricted to either Negro or white membership is an expression of freedom of association." 382 U.S. at 299.

is golf. The maintenance of a golf course and attendant facilities is an expensive proposition. The key points about Burning Tree's size are that it is extremely small for a golf club and that the club has throughout its 67-year existence maintained a ceiling of 250 resident members. Its members have always placed congeniality and selectivity ahead of their pocketbooks: as costs have increased, they have raised initiation fees and annual dues rather than increase the number of members (pp. 107a-108a). If the decision below stands, they face the prospect of being forced to disband and sell out to developers.

B. When a State Infringes the Right of Association, the State's Asserted Justification Must Be Subjected to a Searching Inquiry.

This case also presents the Court an opportunity to emphasize the importance of a rigorous inquiry into both the nature of a state's infringement of the right of intimate association and the asserted state justification for doing so. The Court of Appeals engaged in no analysis of the impact of the withdrawal of the tax deferral on the club's members' exercise of their right of association, stating only that it "is not as great as the interference at issue in *Roberts* and *Rotary Club*" (p. 28a). And the Court of Appeals simply asserted, again without analysis, that whatever interference with the right that did exist was justified by the "compelling state interest," evidenced by the Maryland E.R.A., in eliminating "state supported sex discrimination" (p. 35a). This Court should grant certiorari in order to make clear the necessity for a more searching analysis of the weight of the associational right, the degree of interference with that right, and the asserted state justification for the interference.

As this Court should find upon a full review of the uncontradicted record, the right of association of Burning Tree's members deserves substantial protection. Con-

trary to the Court of Appeals' cavalier dismissal of the issue, the interference with that right that results from withdrawal of the tax deferral is also substantial. The essence of Burning Tree's existence is as a men's golf club. The intent of Chapter 334 was to force the male members of Burning Tree either to admit women, or to pay a prohibitive price for not doing so. This is a thrust at the heart of the members' exercise of their constitutional rights, with the same "deterrent effect . . . as if the State were to fine them" for exercising those rights. *Speiser v. Randall*, 357 U.S. at 518.

Moreover, the Court of Appeals wrongly balanced the infringement of the members' right of association against a broad interest in eliminating public discrimination against women. When a state attempts to justify its infringement of private constitutional or property rights on the basis of a state interest, a court must scrutinize precisely how much that state interest is advanced by the infringement of the private right. In *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), which involved a burden upon the free exercise of religion, the Court found it necessary to "searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."

More recently, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), the Court considered whether California could require a landowner to grant an easement for public passage across his property as a condition to the grant of a permit to rebuild his seaside home. A land use restriction can constitute a taking unless it "substantially advance[s] legitimate state interests." *Nollan*, 483 U.S. at ——, 107 S. Ct. at 3146, *quoting Agins v. Tiburon*, 447 U.S. 255, 260 (1980). The Court scrutinized California's proffered justifications for the condition and recognized that the condition did not contribute to the realization of the goal of the stat-

utory scheme for issuing building permits. Instead, because the easement condition sought to obtain a completely unrelated benefit for the state, it amounted to an "out and out plan of extortion." 483 U.S. at ——, 107 S. Ct. at 3148, *quoting J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981).

The level of scrutiny the Court employed in *Nollan* is fatal to the State's actions in this case. As in *Nollan*, a state has attempted to condition access to a public program—in this case an open space contract—on the relinquishment of a private right. As in *Nollan*, the private right at issue is the right to exclude from private property persons who otherwise would not be permitted access. As in *Nollan*, that condition does not advance the goal of the statutory scheme, which in this case is to preserve open space.

Moreover, in this case, the condition does not serve *any* real interest of the State. Absolutely the only intended and actual effect of Chapter 334 was to increase the likelihood that women would be allowed to play at one club, Burning Tree. That incremental opportunity for a few women to play golf at one small, intensely private club does not advance *any* broad state interest. It cannot justify the complete denial of the freedom of association of all of Burning Tree's members. The State is simply trying to extort from Burning Tree compliance with its concept of the best way to order the private affairs of private citizens.

C. The Court Should Clarify the Distinction Between *Speiser v. Randall* and *Regan v. Taxation With Representation.*

Finally, this case provides the Court an opportunity to emphasize the distinction between the lines of cases represented by *Speiser v. Randall*, on the one hand, and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), on the other. The Court of Appeals mistakenly

considered the case to be governed by the latter line. In fact, it falls squarely within the former.

The principle of *Speiser* is that the government may not penalize a party's exercise of a constitutional right by withdrawing an unrelated tax benefit for which the party qualifies. In *Speiser*, a California statute partially exempted veterans from property taxes, but denied the exemption if the veteran refused to sign a pledge not to advocate the forcible overthrow of the government. The Court's reasoning is fully applicable to the present case:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.

357 U.S. at 518-19 (citation omitted); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Exactly as in *Speiser*, Maryland has denied the reduced taxes to which Burning Tree is entitled by providing open space unless the members of the club agree to give up their constitutional rights. While Maryland was not constitutionally required to institute the open space program, once it did so it could not deny tax deferral under that program to one club that provides open space but whose members also exercise their constitutional rights in a way that displeases the State.[11]

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[11] The Court of Appeals attempted to distinguish *Speiser* by relying on *Lyng v. International Union, UAW*, 485 U.S. 360, 108 S. Ct. 1184 (1988), in which the Court upheld a statute denying increased food stamp benefits to individuals who became eligible for an increase only by going on strike. In *Lyng*, the Court's analysis was premised on a determination that in the factual context of that case

To allow a government to impose discriminatory burdens upon its citizens because of their exercise of constitutional rights guts the Constitution. If the State may impose a multi-fold tax increase upon Burning Tree solely because of its members' exercise of their right to freedom of association, no constitutional principle would restrain a state from denying the deduction for mortgage interest to female homeowners who belong to all-female bridge clubs. No principle would prohibit the imposition of an excise tax on families in which grandparents, parents and children reside together. *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977). No principle would prevent the government from withholding Social Security benefits from married couples who choose to have more children than the state thinks wise.[12]

Regan, upon which the Court of Appeals relied, underscores the unconstitutionality of the State's actions. *Regan* involved §§ 501(c)(3) and 501(c)(4) of the Internal Revenue Code. An organization qualified under § 501(c)(3) is tax-exempt, and its contributors may deduct their contributions on their personal tax returns. An or-

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the food stamp restriction was likely to have little, if any, impact on the way the plaintiffs chose to associate. As a result, there was little "danger to the exercise of associational freedoms." 485 U.S. at ——, 108 S. Ct. at 1190, n.5. That narrow factual distinction is not available to the State in this case. The uncontested record demonstrates that the club anticipates that "an increase in dues of sufficient magnitude to cover the Club's increased taxes . . . would cause a substantial loss in the present membership" (p. 95a).

[12] The Court of Appeals also attempted to distinguish *Speiser* on the ground that withdrawal of the tax deferral contract did not disadvantage Burning Tree because such contracts are "not generally available to comparable landowners," whereas in *Speiser* the tax benefit that was being denied "was available as a matter of course to all similarly situated individuals" (p. 32a). That distinction fails because it is based on a fallacy: the contract being denied to Burning Tree *is* available to "comparable landowners," as comparable landowners are country clubs with golf courses that can provide open space.

ganization qualified under § 501(c)(4) also is tax-exempt, but its contributors may not deduct their contributions to it. A § 501(c)(3) organization may not engage in substantial lobbying, but a § 501(c)(4) organization may. The *Regan* case arose because the lobbying organization Taxation With Representation ("TWR") wanted to reorganize solely under § 501(c)(3) and still engage in lobbying. The Court rejected the claim that the First Amendment entitled TWR to do this, distinguishing *Speiser* as follows:

> TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby.

461 U.S. at 545; *see also Cammarano v. United States*, 358 U.S. 498 (1959).

It is critical that this Court clarify and reemphasize the distinction between *Regan* and *Speiser*. The Court of Appeals' error in this case is that Burning Tree does not contend that a country club can force the State to grant a tax deferral for open space to assure the exercise of an otherwise constitutionally protected right (as was the contention in *Regan*). Nor does it contend that a country club can force Maryland to continue to provide open space tax deferrals. Burning Tree merely contends that having adopted a tax deferral program, Maryland cannot discriminate against a club which furnishes open space in the same manner as other country clubs, but also wants to exercise First Amendment rights. While a *nondiscriminatory* withholding of a tax benefit is permissible, a legislature may not selectively withhold the tax benefit

from those who choose to exercise a separate constitutionally protected right in a way that the government does not approve. *See, e.g., Regan*, 461 U.S. at 552 (concurring opinion of Blackmun, J.).

II. THE IMPAIRMENT OF A CONTRACT IS NOT REASONABLE AND NECESSARY WHEN IT SERVES NO SUBSTANTIAL STATE INTEREST AND THE PROBLEM THAT IT ALLEGEDLY ADDRESSES HAS NOT CHANGED SINCE THE STATE ENTERED INTO THE CONTRACT.

The Maryland General Assembly in 1965 made a policy choice to preserve the open spaces of golf clubs by contracting away a portion of its taxing power in exchange for what amounts to an easement on the clubs' property. It had at least two other ways to accomplish its goal of ensuring adequate open space in the face of increasing urbanization. It could have acquired the open space for park land, or it could have inserted into the tax code a lower assessment for country clubs. By choosing the approach of tax deferral contracts, the State gained at least three significant advantages. First, as noted previously, the State was able to reduce greatly the public cost of preserving open space. Second, the State increased the probability that it would secure the benefit of a club's open space for a long period of time, rather than just for each passing year as would have been the situation had the State simply enacted a lower assessment for clubs. Third, by holding over the club's head the threat of collecting deferred taxes, the State greatly increased the probability in each given year that a club would not in fact develop its land.

Neither in the original 1965 statute, in subsequent amendments, nor in the contract itself did the State ever reserve the power to modify its contract with Burning Tree. Yet, in 1986 the State moved to eliminate its contractual obligation unless the club bowed to the State's concept of who should be included in its membership.

The 1986 legislation poses a Hobson's choice for Burning Tree: either it can give up the tax deferral for which it bargained and has paid (by preserving its land as open space), or its members can give up their right to associate with whom they choose.

As this Court has observed,

> [w]hatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned.

United States Trust Co. v. New Jersey, 431 U.S. 1, 24 (1977). In this case the State, in a purely financial contract, bargained away part of its power to tax Burning Tree.[13] Burning Tree has performed under the contract by giving up the opportunity to sell its land at an enormous profit and the opportunity to relocate the club when land prices were more favorable than they are now. After a change in the prevailing political winds, however, the State has now decided to impose an onerous new obligation on the club—that it change its fundamental nature or else lose its contract without compensation.

That unilateral change substantially impairs the contractual obligation betwen the State and Burning Tree, as the Court of Appeals assumed in its decision (p. 15a). As the Court of Appeals also acknowledged, that impairment violates the Contract Clause unless the State can show a significant purpose to justify the impairment and that the impairment is reasonable and necessary to serve that purpose. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-414 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. at 25.

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[13] The Contract Clause protects contracts in which a state bargains away a portion of its taxing power. *St. Louis v. United Ry. Co.*, 210 U.S. 266, 273 (1908); *Home of the Friendless v. Rouse*, 75 U.S. 430, 438 (1869).

A statute that impairs a contract must be intended to address a "broad and general social or economic problem," *Energy Reserves Group*, 459 U.S. at 412, rather than a narrow or parochial interest. The only purpose and effect of Chapter 334, as enacted, was to prevent one targeted private club from maintaining its existing membership and guest practices, while endorsing the continuation of unbridled sex discrimination in every other club in the state.[14] Although the eradication of public sex discrimination may be a vital state interest, Chapter 334 was not intended to and did not attack that problem.

Even if Chapter 334 had addressed a "broad and general social . . . problem," impairing Burning Tree's contract was not necessary to that purpose. This Court has made clear that impairment of a contract may not be justified on the basis of a need to address a condition that was known at the inception of the contract, especially when the state's own financial interests are at issue. *United States Trust Co. v. New Jersey*, 431 U.S. at 31-32. In this case the E.R.A., which crystallized Maryland's interest in eradicating public sex discrimination, was enacted in 1972. The State has been fully aware of the club's membership and guest policies since 1978 at the latest.[15] Thus, the State's allegedly vital interest clearly existed nine years before it entered into the 1981 contract, and the State was aware of the condition that it now asserts as justifying the impairment three years before it entered into the contract. Absolutely nothing

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[14] The fact that the Court of Appeals has struck down the proviso that allowed all other clubs in the State to continue to discriminate does not validate the original, improper purpose of the statute.

[15] The Maryland Attorney General in 1978 investigated Burning Tree's membership and guest policies. As noted previously, he concluded that the club did not discriminate on the basis of race, color, creed or national origin, and that its policies did not amount to sex discrimination as defined in the statute (p. 3a; *see also Burning Tree Club v. Bainum*, 305 Md. at 59, 501 A.2d at 831-33).

changed between the time the State entered into the 1981 contract and 1986, when it enacted Chapter 334—except the political winds.

III. THE STATE MAY NOT TAKE BURNING TREE'S PRIVATE PROPERTY RIGHTS BY IMPOSING UPON THOSE RIGHTS A CONDITION THAT BEARS NO RELATION TO THE STATUTORY GOAL OF PRESERVING OPEN SPACE.[16]

Had Maryland simply required the owners of Burning Tree's 225 acres (its members) to admit unwanted persons onto the property as members, rather than conditioning Burning Tree's access to an open space contract on a requirement that it admit those unwanted persons, there certainly would have been an unconstitutional "taking." *See Nollan v. California Coastal Comm'n*, 483 U.S. at ——, 107 S. Ct. at 3145. This Court has re-

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[16] *Nollan v. California Coastal Comm'n*, which first made clear that the State's actions in this case could constitute a taking, was decided approximately nine months after briefing closed in the trial court and less than one month before that court rendered its decision. In the Maryland Court of Appeals Burning Tree argued that *Nollan* was an additional ground for holding Chapter 334 unconstitutional. The Court of Appeals did not address that argument. In the circumstances of this case Burning Tree should be permitted to obtain review of its claim under *Nollan* in this Court. *First*, Burning Tree raised the *Nollan* issue in its first filing on the merits after the case was decided. *Cf. Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 176 (1985) (because of intervening change in decisional law, Court considered and decided equal protection claim previously abandoned by petitioner). *Second*, all facts needed to decide the issue are in the undisputed record (*see Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984)), and the issue is purely a legal one. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.2 (1982). *Third*, the State will not be prejudiced by the Court's consideration of this issue. *Fourth*, the application of *Nollan* to state regulation of the rights of private property owners is likely to become "an important, recurring issue," and "the interests of judicial administration will be served by addressing the issue on its merits." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

peatedly held that "as to property reserved by its owner for private use, the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.*, quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). In *Nollan*, a 5-4 decision, this Court also stated that:

> *where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others* . . . "our cases uniformly have found a taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner*" . . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the — premises.

Nollan, 483 U.S. at ——, 107 S. Ct. at 3145, *quoting Loretto*, 458 U.S. at 432-433, n.9, and 434-435 (citations and footnote omitted; emphasis added).

The State is attempting to impose upon Burning Tree a permanent physical occupation that is every bit as intrusive as that which occurred in *Nollan*. The State has given Burning Tree a draconian choice: either it must give up its right to exclude from its private property individuals whom it otherwise would not admit, or it must give up its contract right to defer taxes until the year 2031.

The State's imposition of that choice is a direct parallel to the action that the Court condemned in *Nollan*. In *Nollan* the Court held that California could not require a landowner to grant an easement for public passage across

his property as a condition of the grant of a permit to rebuild his home. The Court viewed the imposition of that condition as an uncompensated taking. As noted previously, a restriction on land use can constitute a taking unless it "substantially advance[s] legitimate state interests." *Nollan*, 483 U.S. at ——, 107 S. Ct. at 3146, *quoting Agins v. Tiburon*, 447 U.S. at 260. The Court reasoned that California could have prohibited the rebuilding of the home, if that prohibition served some legitimate state interest, subject to the limitations imposed under *Agins* and other cases. Or, it could have imposed a condition that would have served the same interest that would have been served by a prohibition, subject to those same limitations. The state could not, however, impose a condition that did not contribute to the same statutory goal that would have been advanced by a prohibition, because:

> the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out and out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981).

Nollan, 483 U.S. at ——, 107 S. Ct. at 3148.

In discussing the requirement that any condition imposed be connected to the state interest asserted as a justification, the Court noted that:

> our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the reg-

> ulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of government purposes and regulations satisfies these requirements.

483 U.S. at ——, 107 S. Ct. at 3146-47. The Court went on to hold that even if it accepted California's argument that the easement condition did serve the same purpose that would have been served by a prohibition, the condition did not advance California's proffered justification—the protection of the public's access to the beach. Thus, the imposition of the condition was a taking of private property rights. 483 U.S. at ——, 107 S. Ct. at 3150.

This case closely parallels *Nollan*. Both the Nollans and Burning Tree were seeking to participate in a governmental program—for the Nollans, a building permit; for Burning Tree, the open space program—generally available to others and important to the continued enjoyment of private property rights. The purpose of Maryland's open space program is the preservation of the open space provided by golf clubs. To serve that purpose Maryland could have prohibited Burning Tree from developing its property, and the constitutional propriety of that prohibition would be tested under *Nollan* and *Agins v. Tiburon*. Or, it could have imposed conditions that would serve the goal of preserving open space. But the State could not impose on Burning Tree's ability to participate in the open space program a condition completely unrelated to that goal. The State can offer *no* reasonable connection between the preservation of open space and the requirement that the club admit women.

The situation here is like *Nollan*'s classic example of the imposition of a condition unrelated to the achievement of a regulatory goal:

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justi-

> fication for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if Calfornia law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. *Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.*

483 U.S. at ——, 107 S. Ct. at 3148 (emphasis added). The underscored language illustrates exactly what Maryland has done in this case. The imposition of the choice to admit women or lose the open space contract may be a lesser restriction on Burning Tree's members' property rights and freedom of association than an outright statutory directive to admit women, but it still does not withstand constitutional review. As noted previously, the State is simply trying to extort from Burning Tree compliance with its concept of how best to order the private affairs and property of private citizens.

Nollan makes clear that state regulators do not have unlimited discretion to attempt social engineering when they are supposed to be regulating land use or otherwise discharging governmental business. Regulatory statutes certainly may regulate and protect the interests of our society, as the legislature sees fit. But they may not be used as omnibus vehicles for imposing all current ideas about social justice onto any entity that comes into tangential contact with the State.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and review the decision of the Court of Appeals of Maryland on the issues raised herein.

Respectfully submitted,

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June 5, 1989

APPENDIX

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APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 106

September Term, 1987

STATE OF MARYLAND *et al.*

v.

BURNING TREE CLUB, INC. *et al.*

MURPHY, C.J.
ELDRIDGE
COLE
RODOWSKY
MCAULIFFE
ADKINS
BLACKWELL,
JJ.

Opinion by ELDRIDGE, J., in which MURPHY, C.J., and MCAULIFFE, J., dissent.

Filed: March 8, 1989

In 1965, the Maryland General Assembly enacted Chapter 399 of the Acts of 1965, then codified as Maryland Code (1957, 1965 Cum. Supp.), Art. 81, § 19(e), and presently codified as Code (1986, 1988 Cum.Supp.), § 8-213 of the Tax-Property Article, which authorized the State to enter into agreements with private country clubs under which the clubs would maintain their land as open spaces in exchange for favorable assessment of those lands for property tax purposes.[1] As originally enacted, this legislation was silent with respect to any type of discrimination. In 1965, pursuant to this enactment, Burning Tree Country Club, a golf club in Montgomery County, Maryland, entered into a 10-year agreement with the State to maintain its land as open spaces in exchange for a favorable tax assessment.

In 1974, the General Assembly, by Ch. 870 of the Acts of 1974, amended Art. 81, § 19(e), to provide that country clubs which discriminated "in granting membership or guest privileges based upon the race, color, creed, sex or national origin of any person or persons" could not qualify for the preferential tax assessment. Ch. 870 provided two exceptions to the prohibition against sex discrimination: the "primary purpose" provision and the "periodic discrimination" provision. Ch. 870 stated in relevant part:

> "The provisions of this section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to clubs which exclude certain sexes on certain days and at certain times."

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[1] Under these agreements the property was assessed as undeveloped land, rather than at its "best use," as if it were "developed to the same density as the surrounding area." Burning Tree Club v. Bainum, 305 Md. 53, 57, 501 A.2d 817, 819 (1985).

In 1975, Burning Tree, which restricts its membership to men and permits only members and their male guests to use its facilities, extended its open spaces agreement with the State for another ten years. In 1978, the Attorney General of Maryland, pursuant to his authority under § 19(e)(4), determined that the sex discrimination ban in Ch. 870 was inapplicable to Burning Tree because it was operated with the primary purpose of serving one sex. In 1981, Burning Tree entered into a 50-year "open spaces" agreement with the State. From 1974 to the present, Burning Tree has been the only country club to benefit from the primary purpose provision.

In 1983, Stewart Bainum [2] and Barbara Renschler brought suit, as taxpayers and, in Ms. Renschler's case, as a woman seeking membership in Burning Tree, to have the primary purpose provision declared unconstitutional on the ground that it violated Art. 46 of the Maryland Declaration of Rights, known as the Equal Rights Amendment or E.R.A. That case reached this Court and was decided in *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985). A majority of the Court held that the primary purpose provision violated the E.R.A., *Burning Tree Club v. Bainum*, *supra*, 305 Md. at 85-88 (opinion of Judge Rodowsky), 88-102 (opinion of Judge Eldridge joined by Judge Cole and Judge Bloom), 501 A.2d at 833-842. A somewhat different majority of the Court, however, held that the primary purpose provision was not severable from the language of Ch. 870 prohibiting sex discrimination, *Burning Tree Club*, 305 Md. at 80-84 (opinion of Chief Judge Murphy, joined by Judge Smith and Judge Orth), 88 (opinion of Judge Rodowsky), 501 A.2d at 830-833, 835. The Court's conclusion, therefore, was that

> "[t]he invalid primary purpose provision is not severable from the prohibition against sex discrimina-

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[2] Stewart Bainum was, at the time, a member of the Maryland State Senate, representing a portion of Montgomery County.

> tion so that the latter falls, together with the then completely superfluous periodic discrimination provision." 305 Md. at 83-84, 501 A.2d at 832.

The result of that decision was to permit Burning Tree to continue receiving its tax benefit while also maintaining its discriminatory policies. Within six weeks of this Court's decision in *Burning Tree Club v. Bainum*, a bill was introduced in the General Assembly to reinstate the prohibition against sex discrimination by country clubs receiving the tax assessment benefit. The bill, as amended during the legislative process, was ultimately enacted as Ch. 334 of the Acts of 1986. Ch. 334 as codified states in its entirety:

> "(a) *In General*—Except as provided in subsection (b) of this section, if a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on race, color, creed, sex or national origin in granting membership or guest privileges, the country club may not make an agreement under this subtitle.
>
> "(b) *Exception*—If the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section."

Subsection (b) of Ch. 334 is, in essence, the periodic discrimination provision which had not been specifically challenged in the prior litigation but which this Court struck down as "completely superfluous."

On June 23, 1986, the Supervisor of Assessments for Montgomery County, acting pursuant to the new statute, notified Burning Tree that effective July 1, 1986, the country club's lands would be assessed at their full cash value because of the club's discriminatory membership policies. On June 30, 1986, Burning Tree and two of its members filed the present action in the Circuit Court for Anne Arundel County against the State of Maryland,

the Governor, the Attorney General, and the State Department of Assessments and Taxation, seeking declaratory and injunctive relief.[3] In its complaint, Burning Tree asserted (1) that Chapter 334 was intended to have only prospective effect and did not affect Burning Tree's current 50-year 'open spaces' contract with the state; (2) that if Chapter 334 was held to affect Burning Tree's current contract, it violated Art. 1, § 10 (the Contract Clause) of the United States Constitution; (3) that Chapter 334 was a special law prohibited by Article III, § 33, of the Maryland Constitution; (4) that Chapter 334 violated Burning Tree's members' freedom of association rights under the United States Constitution; and (5) that the periodic discrimination exception in Chapter 334 violated the E.R.A. and that the unconstitutional language was not severable from the overall prohibition of sex discrimination in Chapter 334.

On July 21, 1987, the Circuit Court for Anne Arundel County granted the State's motion for summary judgment with respect to the first four contentions but granted summary judgment in favor of Burning Tree as to the contention that the periodic discrimination provision violated the E.R.A. In addition, the circuit court agreed with Burning Tree that the periodic discrimination provision was not severable from the overall prohibition on sex discrimination in Ch. 334. The circuit court's conclusions were embodied in a declaratory judgment. While an injunction had been prayed for, the circuit court, for some unexplained reason, did not issue one, even though Burning Tree had not paid all its taxes due and had prevailed with respect to its E.R.A. contention.[4]

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[3] The plaintiffs collectively will hereafter be referred to as "Burning Tree," and the defendants collectively will be referred to as "the State."

[4] At oral argument before this Court, counsel for Burning Tree indicated that the club had still not paid the full taxes demanded by the State and was accruing penalties as a result. Consequently,

The State and Burning Tree filed cross-appeals to the Court of Special Appeals, and, before any proceedings in the Court of Special Appeals, both sides filed in this Court petitions for a writ of certiorari. Thereafter, this Court granted both petitions. In this Court, Burning Tree advances the same five contentions made in the circuit court and set forth above.

We shall, in agreement with the circuit court, reject the first four of Burning Tree's arguments. As to the fifth argument, we agree with the circuit court and with Burning Tree that the periodic discrimination provision violates the E.R.A. Nevertheless, we shall hold that the invalid periodic discrimination provision is severable from the broad prohibition against sex discrimination contained in Ch. 334.

I.

The first issue before is is whether Ch. 334 of the Acts of 1986 addresses only future contracts and is therefore inapplicable to the 50-year contract entered into by the State and Burning Tree in 1981. Burning Tree argues that the plain language of Ch. 334, particularly the words "may not make an agreement under this subtitle," addresses only future contracts and does not affect clubs with existing agreements.

The state court below, after examining the legislative purpose and history of Ch. 334, concluded that the statute was intended to apply to contracts in force at the time it was enacted. The court noted that the statute would

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this case does not involve the situation addressed in cases such as Apostol v. Anne Arundel County, 288 Md. 667, 672, 421 A.2d 582 (1980), in which we stated: "It is firmly established in this State that once a taxpayer voluntarily pays a tax or other governmental charge, under a mistake of law or under what he regards as an illegal imposition, . . . no common law or declaratory judgment action lies to challenge the validity of a tax so paid." *See also* Nordheimer v. Montgomery County, 307 Md. 85, 96-98, 512 A.2d 379, 385-386 (1986), and cases cited therein.

not apply retroactively to the tax benefits Burning Tree had already received under the contract prior to Ch. 334's enactment. We agree with the circuit court's conclusion.

The background and legislative history of the phrase in Ch. 334, "may not make an agreement under this subtitle," refutes-Buring Tree's argument that the language applies only to future agreements. Art. 81, § 19(e), as reenacted in 1974, stated in relevant part as follows (emphasis added):

> "4 *In order to qualify under this section*, the club shall not practice or allow to be practiced any form of discrimination in granting membership or guest privileges based upon the race, color, creed, sex, or national origin of any person or persons. . . . The provisions of this section with respect to discrimination in sex do not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times. If the Attorney General determines that a pattern of discrimination is evident in any club, he shall negotiate a consent agreement with that club to cease such discrimination. If that club breaches or violates the consent agreement or refuses to enter a consent agreement, then the Attorney General shall issue a cease and desist order to that club. If the club breaches or violates the terms of the cease and desist order, the tax exemption, tax credit or beneficial assessment shall be withdrawn, . . . Further, any club which fails to qualify as a country club under paragraph (4) because the club has engaged in discrimination is not liable for unpaid taxes provided for in paragraph (7). . . .
>
> "(7) *If, prior to the expiration of the agreement*, or any extension thereof, . . . *said property* ceases to be used as, or *fails to qualify as, a country club*,

whichever is the earlier date, the unpaid taxes . . . become due and payable."

This was the statutory language in effect when the current contract was entered into.

In 1985, as part of the on-going recodification process which began in 1973. Art. 81 was revised and the relevant passages were placed in §§ 8-214 and 8-215(d) of the Tax-Property Article of the Code. Those sections provide as follows (emphasis added):

"§ 8-214. Same—Discrimination.

"(a) *In General.*—Except as provided in subsection (b) of this section, if a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on race, color, creed, sex, or national origin in granting membership or guest privileges, the country club *may not make an agreement* under this subtitle.

"(b) *Exceptions.*—If the facilities of a country club that meets the qualifications of § 8-212 of this subtitle are operated with the primary purpose of serving or benefiting members of a particular sex or if the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section."

"§ 8-215. Same—Determination of discrimination and consent agreements.

* * * *

"(d) *Assessing on failure to comply.*—(1) If a country club fails to comply with an order issued under subsection (c) of this section, the country club may not be assessed as a country club under § 8-213 of this subtitle until the Attorney General determines that the country club complies with the order.

> (2) A country club that has failed to comply with an order issued under subsection (c) of this section shall be assessed as if there were no agreement under § 8-213 of this subtitle. However the country club is not liable for the unpaid taxes described in § 8-216 of this subtitle."
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> * * * *

According to the Revisor of Statutes, the language of §§ 8-214(a) and 8-215(d) was "new language derived without substantive change" from former Art. 81, § 19 (e). Revisor's Note to §§ 8-214 and 8-215. The Revisor's Note to § 8-214 adds:

> "Also in subsection (a) of this section, the phrase 'may not make an agreement under this subtitle' is substituted for the former phrase 'in order to qualify under this section' for clarity."

This Court has consistently taken the view that "the revisor's note is a useful guide to the legislative purpose underlying [a] change in statutory language.'" *Nationwide v. USF & G*, 314 Md. 131, 147, 550 A.2d 69, 77 (1988), quoting *Rohrbaugh v. Estate of Stern*, 305 Md. 443, 450, 505 A.2d 113 (1986). That the revised language at issue here created no substantive change is further underscored by the principle that "'a language change effected during the course of formal code revision accomplishes no substantive change absent the clearest legislative intent.'" *Nationwide v. USF & G*, *supra*, 314 Md. at 147, 550 A.2d at 77, quoting *McGarvey v. State*, 311 Md. 233, 242, 533 A.2d 690 (1987).

The only effect of the decision by this Court in *Burning Tree v. Bainum*, *supra*, was to eliminate the word "sex" from § 8-214(a) and to eliminate the exceptions in § 8-214(b) to the prohibition against sex discrimination. Ch. 334 of the Acts of 1986, re-enacted § 8-214, making only two changes. It deleted the invalid "primary purpose" provision from § 8-214(b) and it restored the word "sex" to § 8-214(a):

"(a) *In General*—Except as provided in subsection (b) of this section, if a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on race, color, creed, sex or national origin in granting membership or guest privileges, the country club may not make an agreement under this subtitle.

(b) *Exception*—If the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section."

What this background makes clear is that the language at issue here—"may not make an agreement"—is not new language in Ch. 334. It first appeared in the 1985 revision of Art. 81 and was intended to have the same meaning as the words "in order to qualify under this section" in Art. 81, § 19(e)(4)(i).

It is apparent that, under Art. 81, § 19(e), "qualifying" is an ongoing process, not merely an initial step, and that a club may "fail to qualify" at any time during the course of the agreement and have its "tax benefit or preferential assessment . . .withdrawn." This is underscored by the administrative construction of Art. 81, § 19(e). In response to the 1974 enactment, the Attorney General's Office investigated the discriminatory practices of all country clubs, regardless of whether their assessment agreements predated July 1, 1974, the date of the legislative enactment. Thus the Attorney General's understanding of Art. 81, § 19(e), and his practice in enforcing it, was that it applied to clubs with existing agreements. The administrative construction of a statute is, of course, entitled to weight. *See, e.g., Sinai Hosp. v. Dep't of Employment*, 309 Md. 28, 46, 522 A.2d 382 (1987); *Balto. Gas & Elec. v. Public Serv. Comm'n*, 305 Md. 145, 161, 501 A.2d 1307 (1986), and cases there cited.

Moreover, the words "may not make," as codified in § 8-214, are linked to the enforcement machinery de-

scribed in §28-215. Clearly the language of § 8-215, which speaks of assessing country clubs "as if there were no agreement under § 8-213 of this subtitle," contemplates enforcement against clubs with existing contracts.

Finally, Burning Tree's construction would entirely defeat the purpose of Ch. 334. Ch. 334 was enacted within six months of, and in response to, this Court's decision in *Burning Tree Club v. Bainum, supra.* The sponsor of the bill was Senator Bainum, whose lawsuit had attempted to deprive Burning Tree of its tax assessment benefit. The Legislature's obvious intent was to reenact the prohibition against sex discrimination and make it applicable to existing contracts. If we were to hold Ch. 334 inapplicable to existing contracts, no country club under a current "open spaces" contract would be required to alter discriminatory policies until its contract expired. In the case of Burning Tree, the club would continue to receive its tax benefit until the year 2031. It is implausible that the General Assembly would move with such alacrity to enact a ban on sex discrimination which would have no effect for such a long period.

In *State Commission on Human Relations* v. *Amecom Div.*, 278 Md. 120, 360 A.2d 1 (1976), this Court held that an anti-discrimination statute applied to existing contracts, rejecting an argument that the statute was not applicable to employees under employment contracts entered into before the statute passed. The Court said, "the purpose of [the statute] may only be adequately served by retroactive application with regard to the date of formation of the contract. . . . [G]iving [the statute] effect only with regard to contracts of employment entered into after [the date of the statute] would mean that an employee of long standing would find the [statutory] remedy unavailable while a new employee could receive its benefits. Such an absurd result could not have been intended. . . ." 278 Md. at 127, 360 A.2d at 6.

Similarly, in the present case, the legislative purpose of eliminating state support for discrimination would only be adequately served by making Ch. 334 applicable to current as well as future contracts.

II.

Burning Tree next argues that applying Ch. 334 to Burning Tree's present contract with the State impairs the obligation of the contract in violation of the Contract Clause of the United States Constitution, Art. I, § 10, which provides that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts." Burning Tree contends that Ch. 334's prohibition against sex discrimination imposes a unilateral change in the contractual obligation between the State and Burning Tree. According to Burning Tree, when the 50-year contract was entered in 1981, the primary purpose exception was part of the law and the contract. The removal of the primary purpose exception by Ch. 334, the argument continues, imposes a much heavier obligation upon the club than it agreed to undertake when it signed the contract, thereby violating the Contract Clause. In our view, however, Ch. 334 does not impair the obligation of contract in violation of the Contract Clause.

It is a fundamental principle that contracts are subject to the public policies and valid laws existing at the time and place in which they are made. Thus the Supreme Court stated in *Abilene National Bank of Abilene v. Dolley*, 228 U.S. 1, 5, 33 S.Ct. 409, 410, 57 L.Ed. 707, 709 (1913): "Contracts made after the law was in force, of course, are made subject to it, and impose only such obligations and create only such property as the law permits." Consequently, courts in a wide variety of contexts have refused to enforce contractual provisions which conflicted with laws or public policy.[5] *See, e.g., Otis &*

[5] In addition to invalidating contractual provisions that conflict with laws, a corollary principle reads existing laws into the terms

Co. v. Securities and Exchange Comm., 323 U.S. 624, 638, 65 S.Ct. 483, 490, 89 L.Ed. 511, 522 (1945); *United States v. City and County of San Francisco*, 310 U.S. 16, 28, 60 S.Ct. 749, 756, 84 L.Ed. 1050, 1059 (1940); *Gable v. Colonial Ins. Co.*, 313 Md. 701, 704, 548 A.2d 135, 136 (1988); *Lee v. Wheeler*, 310 Md. 233, 243, 528 A.2d 912, 917 (1987); *Jennings v. Government Employees Ins.*, 302 Md. 352, 488 A.2d 166 (1985); *Budget Rent-A-Car v. Raab*, 268 Md. 478, 482-483, 302 A.2d 11, 13-14 (1973); *Baxter v. Wilburn*, 172 Md. 160, 162-164, 190 A. 773, 775 (1937).

The Maryland Equal Rights Amendment, enacted in 1972, mandated equality of rights under the law and rendered state-sanctioned sex-based classifications suspect. Decisions by this Court prior to 1981 made it clear that sex-based classifications were generally forbidden by the E.R.A. *See, e.g., Rand v. Rand*, 280 Md. 508, 515-516, 374 A.2d 900 (1977); *Md. St. Bd. of Barber Ex. v. Kuhn*, 270 Md. 496, 506-507, 312 A.2d 216 (1973). The E.R.A. and the judicial decisions construing it represent the law and public policy of the State. Every Maryland contract entered with the State government since the enactment of the E.R.A. has been subject to the constitutional provision and the judicial decisions under it.

In addition, Ch. 870, enacted in 1974, among other things, denied tax benefits to country clubs that discriminated on the basis of sex. This provision was constitu-

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of contracts. Thus, as we stated in Prince George's Club v. Carr, 235 Md. 591, 607, 202 A.2d 354 (1964):

> "This Court, in various decisions over a long span of years, has cited and applied 'the general rule that subsisting laws enter into and form part of a contract as if expressly referred to or incorporated in its terms'" (*quoting Holmes v. Sharretts*, 228 Md. 358, 367, 180 A.2d 302 (1962)).

See also Wright v. Commercial Sav. Bank, 297 Md. 148, 153, 464 A.2d 1080 (1983); Design & Funding v. Betz Garage, 292 Md. 265, 276, 438 A.2d 1316 (1981); Dennis v. City of Rockville, 286 Md. 184, 189-190, 406 A.2d 284 (1979).

tional, and the 1981 contract was made subject to it as well. The fact that this particular language later became ineffective on severability grounds does not alter its status as a valid public policy to which the contract was subject.

Ch. 870 also created a sex-based classification, permitting clubs operated with the primary purpose of serving one sex to continue receiving tax benefits. This provision violated the E.R.A. and was invalid from its inception. *Burning Tree v. Bainum, supra*, 305 Md. at 84, 501 A.2d at 832.

Contracting parties are presumed to be "mindful of the existing law." *Wright v. Commercial Sav. Bank*, 297 Md. 148, 153, 464 A.2d 1080, 1083 (1983). Yet, despite the E.R.A. and this Court's decisions that sex-based classifications under state law were constitutionally suspect, Burning Tree purportedly relied on the invalid primary purpose provision when entering into the 1981 contract. Burning Tree now claims that Ch. 334 imposes new and onerous obligations of which it was unaware when it contracted in 1981. But Ch. 334 imposes no obligation on Burning Tree that was not imposed by valid laws and public policy in effect in 1981. It simply restores the language banning sex discrimination which was part of the law to which the contract was subject in 1981. The Contract Clause does not bind the State to carry out the terms of a statute which was unconstitutional. Such a result would violate the principle that courts will not enforce invalid terms; it would give greater weight to a contracting party's unwarranted reliance on an invalid statute than to the actual laws and public policies of the State.

Apart from our rejection of Burning Tree's Contract Clause argument on the ground that it ignores the law and public policy existing at the time the contract was made, we do not believe that Burning Tree's argument prevails under traditional Contract Clause analysis.

The Supreme Court, in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 580 (1985), articulated the approach to be used in considering contract clause arguments:

> "The threshold inquiry is 'whether the state law has, in fact operated as a substantial impairment of a contractual relationship.' *Allied Structural Steel v. Spannous*, 438 U.S. 234, 244 (1978). . . . If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, *United States Trust Co.* [*v. New Jersey*], 431 U.S. [1], at 22, such as the remedying of a broad and general social or economic problem.
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> * * * *
>
> "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' *United States Trust Co.*, 431 U.S. at 22."

See Chevy Chase S&L v. State, 306 Md. 384, 416, 509 A.2d 670 (1986); *Robert T. Foley v. W. S. S. C.*, 283 Md. 140, 389 A.2d 350 (1978).

We shall assume, arguendo, that Ch. 334 does operate as a substantial impairment of the contractual relationship between Burning Tree and the State. But, as the above quotation makes clear, a finding of substantial impairment is merely a threshold step; it does not necessarily lead to the conclusion that the Contract Clause has been violated.

If the State has "a significant and legitimate public purpose behind the regulation . . . such as the remedying

of a broad and general social or economic problem," and if the means employed by the State are "appropriate to the public purpose," then even a substantial impairment will not violate the Contract Clause. *Energy Reserves Group v. Kansas Power & Light*, *supra*, 459 U.S. at 411-412, 103 S.Ct. at 704-75, 74 L.Ed.2d at 581. The public purpose behind Ch. 334 was the elimination of state-sanctioned sex discrimination. The significance and legitimacy of this purpose is beyond doubt.

Furthermore, the means employed in Ch. 334 are reasonable and necessary to carry out the purpose of the statute. The Supreme Court has cautioned that, "[w]hen the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Energy Reserves*, *supra*, 459 U.S. at 412-413 n. 14, 103 S.Ct. at 705 n. 14, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92 (1977). Nevertheless, the means employed in this case are not arbitrary or oppressive. Ch. 334 does not even prohibit Burning Tree from discriminating. It simply provides that, if Burning Tree continues to discriminate, its property will be assessed in the same manner as the property of other taxpayers in the area. On the other hand, Ch. 334 gives Burning Tree the choice of retaining its preferential tax assessment by discontinuing its discriminatory policies. Finally, Ch 334 in no way requires Burning Tree to reimburse the State for any of the tax advantages it enjoyed in years previous to the enactment. The elimination of sex-discrimination was not a subterfuge for the State to extricate itself from a financial obligation. In our view, the statute imposes no greater impairment than was necessary to remove the imprimatur of the State from sex discrimination.

III.

Burning Tree contends that Ch. 334 is a "special law" passed in violation of Art. III, § 33, of the Maryland Constitution. Art. III, § 33, provides that the General Assembly "shall pass no Special Law, for any case, for which provision has been made, by an existing General Law . . . ." This Court has identified a "special law" as "one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Prince George's Co. v. B. & O. R. Co.*, 113 Md. 179, 183, 77 A. 433 (1910).

Burning Tree's special law argument is that Ch. 870, enacted in 1974, created a class of clubs that were permitted to discriminate on the basis of sex while enjoying the "open spaces" tax benefit. That class was composed of Burning Tree, which wholly discriminates on the basis of sex, and those clubs that engage in periodic discrimination. Burning Tree argues that, among all the members of that class, Ch. 334 imposes a burden only on Burning Tree, as the others remain exempt because of the periodic discrimination provision.

The short answer to Burning Tree's argument is that, because in Part V of this opinion we invalidate the periodic discrimination provision, Burning Tree is not the only club in its self-described class that will be forced to change its policies or lose its tax benefit. Even if we were not to invalidate the periodic discrimination provision, however, Ch. 334 as enacted would not be a "special law".

In *Cities Service Co. v. Governor*, 290 Md. 553, 567, 431 A.2d 663 (1981), this Court examined decisions applying § 33, concluding that "no mechanical rules for deciding cases" exist. Nonetheless, the Court enumerated several factors to be considered in deciding whether a statute is a "special law." The Court reiterated the im-

portance of these factors in *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892 (1984). The factors include: whether "the underlying purpose of the legislation is to benefit or burden a particular class member or members"; whether particular people or entities are identified in the statute; and what "the substance and 'practical effect'" of a statute is and not simply its form. *State v. Good Samaritan Hospital, supra*, 299 Md. at 330, 473 A.2d at 902; *Cities Service Co. v. Governor, supra*, 290 Md. at 569, 431 A.2d at 672-673. Our past decisions have also considered whether particular entities or individuals sought and obtained special advantages under the legislation or if other similar entities or individuals were discriminated against by the legislation. *Cities Service Co., supra*, 290 Md. at 570, 431 A.2d at 673. In deciding whether a law violates § 33 in applying to only certain members of a class, we have looked to whether the statute's distinctions are arbitrary or unreasonable. *Ibid.* Moreover, this Court has held that some enactments were not special laws even though they applied to only a single entity. Such laws are permissible where unique circumstances render the entity a class unto itself, *Cities Services Co., supra*, 290 Md. at 568, 431 A.2d at 672, or where the enactment, although it affects only one entity currently, would apply to other similar entities in the future, *Reyes v. Prince George's County*, 281 Md. 279, 305-306, 380 A.2d 12 (1977); *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 379, 293 A.2d 241 (1972).

In light of these considerations, we turn to the merits of Burning Tree's assertion that it is the only member of its class which is singled out by Ch. 334. The underlying purpose of Ch. 334 was to eliminate state conferred benefits for clubs that discriminate on the basis of sex. The legislation was not aimed at benefiting or burdening Burning Tree or any other particular club. Neither Burning Tree nor any other club is singled out

by name in the statute. Nor is Burning Tree the only club to which Ch. 334's prohibition on sex discrimination applies.

Contrary to Burning Tree's contention that it is the only entity affected by Ch. 334, the prohibition of sex discrimination in that enactment applies to all current and future country clubs with open spaces contracts, including the other members of Burning Tree's self-described class. While Ch. 334 purports to permit clubs to engage in sex discrimination on certain days or certain times, the prohibition against sex discrimination is otherwise applicable to all members of the class in such matters as membership, facilities, dues, etc. Thus, Ch. 334's prohibition against sex discrimination does not apply solely to Burning Tree. Nor does the periodic discrimination exception in Ch. 334 exclude Burning Tree or any other club. If it were valid, it would be available to any entity, including Burning Tree, that otherwise qualifies and desires to take advantage fo it. Simply because a law prohibits an activity that an entity engages in, and provides an exception which the entity does not take advantage of, does not render it a special law.

This is clearly not a case where a single entity is affected by a law. Moreover, even if this were such a case, Ch. 334 would not be a special law. As noted above, laws affecting only a single entity have been upheld where they can apply, in principle, to other similarly situated entities. In *Reyes v. Prince George's County*, *supra*, we held that an act empowering the county government to sell bonds in order to acquire "any sports stadium or sports arena in Prince George's County" was not a special law. Although only one arena existed in Prince George's County at the time, we held the statute was not a special law because "if the county wishes to acquire or finance other sports facilities in the

county, it may do so." 281 Md. at 306, 380 A.2d at 27. Similarly, in *Potomac Sand & Gravel v. Governor*, *supra*, a statute which prohibited dredging in Charles County wetlands was held not to be a special law even though it currently affected only one company. The Court said: "[I]f others wished to dredge the wetlands of Charles County, they too would be prohibited from doing so." 366 Md. at 379, 293 A.2d at 252.

The decision in *Cities Services*, *supra*, is not inconsistent. In that case this Court held that a "mass merchandiser exception," which exempted certain retail service stations from the State's retail gasoline station divestiture law, was a special law because it benefited a single entity. However, because of the qualifying dates contained in the exemption, the single entity affected by statute was the only entity that could ever be helped by the exemption. This is not true in the present case as, in the future, clubs with policies similar to Burning Tree's would be similarly affected by Ch. 334.

IV.

We now turn to Burning Tree's claim that Ch. 334 infringes upon the club members' freedom of association rights under the United States Constitution.

Recent decisions by the Supreme Court have distinguished two types of associational rights. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. , , 107 S.Ct. 1940, 1945, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618, 104 S.Ct. 3244, 3249-3250, 82 L.Ed.2d 462, 471 (1984). *See also New York State Club Ass'n v. City of New York*, 108 S.Ct. 2225, 2233-2234, 101 L.Ed.2d 1, 15-16 (1988). The first type, which has been called "freedom of expressive association," protects the right to associate "for the purpose of engaging in those activities

protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, *supra*, 468 U.S. at 618, 104 S.Ct. at 3249, 82 L.Ed.2d at 471.

The second type of associational right, "freedom of intimate association," protects "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." *Roberts*, *supra*, 468 U.S. at 617-618, 104 S.Ct. at 3249, 82 L.Ed.2d at 471. *See New York State Club Ass'n*, *supra*, 108 S.Ct. at 2233-2234, 101 L.Ed.2d at 15-16; *Rotary Club*, *supra*, 107 S.Ct. at 1945, 95 L.Ed.2d at 484.[6]

In contending that Ch. 334 infringes its members' rights to freedom of association, Burning Tree does not expressly draw a distinction between the two types of associational rights. The club claims that it is seeking "First Amendment protection," which may suggest that

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[6] In discussing the considerations that underlie this protection the Supreme Court has pointed to its earlier decisions protecting an individual's right to marry, Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); an individual's right to make decisions regarding childbearing, Carey v. Population Services Intern., 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); a parent's right to direct the education of his or her children, Smith v. Organization of Foster Families, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); and Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

it is relying on freedom of expressive association.[7] The club, however, alleges no infringement of the types of activities which freedom of expressive association protects. Rather, the club asserts that its "size, purpose, policies, selectivity, congeniality" and exclusivity imbue it with associational rights. These are the characteristics listed in the *Roberts* and *Rotary Club* opinions as relevant in determining whether a group may enjoy intimate associational rights which would protect the group from anti-discrimination legislation. Therefore, when analyzed, Burning Tree's argument would appear to be based on freedom of intimate association.

A.

The Supreme Court has neither precisely defined the scope of freedom of intimate association nor delineated the sort of relationships which enjoy its protection. The Court has stated, however, that "[t]he personal affiliations that . . . suggest some relevant limitations on the relationships that might be entitled to this constitutional protection, are those that attend the creation and sustenance of a family." *Roberts*, *supra*, 468 U.S. at 619, 104 S.Ct. at 3250, 82 L.Ed.2d at 472. The Court added (468 U.S. at 619-620, 104 S.Ct. at 3250-3251, 82 L.Ed.2d at 472):

> "Family relationships . . . are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely

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[7] There is language in Supreme Court opinions, however, indicating that freedom of intimate association may, to some extent, be grounded upon the First Amendment. *See Rotary Club*, *supra*, —— U.S. at ——, 107 S.Ct. at 1946, 95 L.Ed.2d at 484; Hishon v. King & Spalding, 467 U.S. 69, 78, 104 S.Ct. 2228, 2235, 81 L.Ed.2d 59 (1984).

> to reflect the considerations that have lead to an understanding of freedom of association as an intrinsic element of personal liberty."

How far the protection extends beyond familial relationships is unclear. In *Roberts*, the Court stated (468 U.S. at 620, 104 S.Ct. at 3251, 82 L.Ed.2d at 473):

> "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees. . . . Between these poles, of course, lies a broad range of human relationships that may have greater or lesser claims to constitutional protection from particular incursions by the State."

This language suggests that relationships should be viewed along a continuum from most to least intimate, with the most intimate associations afforded the greatest protection from government interference and the least intimate afforded lesser protection. *See* Note, *Private Club Membership—Where Does Privacy End and Discrimination Begin?*, 61 St. John's L. Rev. 474, 490 (1987).

In *Rotary Club*, *supra*, U.S. at , 107 S.Ct. at 1946, 95 L.Ed.2d at 484, the Court noted that it had "not held that constitutional protection is restricted to relationships among family members." Nevertheless, in no case has the Court actually extended the protection beyond the scope of familial relationships. For example, in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the Court held that a zoning ordinance which restricted occupancy of single-family dwellings to families or groups of no more than two unrelated persons did not infringe associational rights of six unrelated students who wanted to share a house. The Court said: "The ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it

likes." *Village of Belle Terre v. Boraas*, *supra*, 416 U.S. at 9, 94 S.Ct. at 1541, 39 L.Ed.2d at 804.

In contrast, three years later, in *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), the Court invalidated a zoning ordinance which limited occupancy to members of a single family but which defined 'family' so as not to include a grandmother living with her two grandsons. The Court stated that the municipality's reason for the ordinance, namely the alleviation of overcrowding, was inadequate to justify the intrusion "on choices concerning family living arrangements." 431 U.S. at 499, 97 S.Ct. at 1936, 52 L.Ed.2d at 537. The Court's plurality opinion explicitly distinguished *Belle Terre*, saying: "The ordinance [in *Belle Terre*] affected only *unrelated* individuals. . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself." 431 U.S. at 498, 97 S.Ct. at 1935, 52 L.Ed.2d at 537.

The Supreme Court in the *Rotary Club* case had little difficulty concluding that an anti-discrimination statute did not impair intimate associational rights. Despite the fact that Rotary membership was not open to the general public, and that the size of the local Rotary clubs varied widely, with some having fewer than 20 members, the Court pointed out that the Rotary Club's goal was to be inclusive, not exclusive, and to consistently grow in membership. Furthermore, the Club's activities were conducted publicly "rather than carrying on their activities in an atmosphere of privacy." *Rotary Club*, *supra*, U.S. at , 107 S.Ct. at 1947, 95 L.Ed.2d at 485.

While the above-mentioned factors led the Court to conclude that the challenged provision did not impair the associational rights of Rotary Club members, the Court's opinion left unanswered whether an organization such as Burning Tree might enjoy associational protection where the Jaycees and Rotary Club did not. In arguing that it

does enjoy the protection, Burning Tree points to its size, approximately 440 members, and its founding as a small group of congenial men devoted solely to the game of golf. The club argues that it is selective in that individuals may not apply to join the club but must be proposed and seconded for membership by current members. A prospective member's background is carefully screened, making the admission process last at least one year. More candidates are proposed for membership than are actually admitted. Finally, the club points to its policy prohibiting discussion of business matters on the premises and the absence of non-golf activities at the club. Consideration of these factors does not, however, lead to the conclusion that the associational rights of Burning Tree's members have been unconstitutionally infringed.

The size of Burning Tree's membership is not so small as to suggest that it is entitled to constitutionally protected intimate associational rights.[8] In *New York State Club Ass'n v. City of New York*, *supra*, the Supreme Court rejected a claim that New York City's Human Rights Law (N.Y.C. Admin. Code § 8-102(9)) was facially invalid. The law defined as a public accommodation subject to anti-discrimination provisions any club which "has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." In discussing the statute, the Court noted (108 S.Ct. at 2233, 101 L.Ed.2d at 15):

> "The clubs that are covered under the Law contain at least 400 members. They thus are comparable in size to the local chapters of the Jaycees that we found not to be protected private associations in *Roberts*,

[8] Although the exact size of the membership of the club is not evident from the record, it appears to be in excess of 440 members, including resident and non-resident members.

> and they are considerably larger than many of the local clubs that were found to be unprotected in *Rotary*, some which included as few as 20 members."

The evidence in the record with respect to the other factors is also less than compelling. The assertion that club policy prohibits the discussion of business matters is not a sufficient basis for concluding that such discussions in fact do not take place. As for selectivity, while it appears the club will not take just anyone, it is unclear what selective criteria are required for admission other than being a male interested in golf. In short, Burning Tree has not established that it qualifies for the intimate associational rights described in *Roberts* and *Rotary Club*.

Other courts have generally been reluctant to recognize constitutionally protected freedom of intimate association rights beyond family relationships. In *Concord Rod & Gun Club, Inc. v. MCAD*, 402 Mass. 716, 524 N.E.2d 1364, 1367 (1988), the Supreme Judicial Court of Massachusetts rejected a freedom of intimate association challenge to an administrative determination that a hunting and fishing club was a public accommodation subject to the state's anti-discrimination laws. The court applied the factors articulated in *Roberts* and *Rotary Club*, and concluded as follows:

> "The commissioner's findings leading to the conclusion that the Club does not have a selective process for admittance to membership establish with equal force that application of the anti-discrimination statute to the Club does not impair the members' rights of intimate association."

In *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 219 Cal.Rptr. 150, 707 P.2d 212 (1985), the Supreme Court of California held that the Boys' Club, a private organization open to any boy but not to girls, did not enjoy intimate associational rights.

Commentators have differed somewhat as to the implications of *Roberts* and *Rotary Club* for various nonfamilial groups. One writer has stated (Comment, *Board of Directors of Rotary International v. Rotary Club of Duarte: Redefining Associational Rights*, 1988 B.Y.U. L. Rev. 141, 152-153):

> "Whether large, single-sex social organizations . . . can be afforded protection as 'intimate associations' is no longer . . . 'open to serious consideration.' Consequently, the freedom of 'expressive association' is now essentially the only available avenue for nonfamily type groups seeking constitutional protection."

Professor William P. Marshall, in *Discrimination and the Right of Association*, 81 Nw. U.L. Rev. 68, 82 (1986), pointed out that

> "few organizations are likely to merit protection as 'friendships' because the protectable interest does not derive from simple membership, acquaintance, or casual alliance. Even a small club with personal contact between all members is probably not sufficient to merit constitutional protection because the depth of commitment and strength of personal attachment between all members must be great to achieve any true semblance of intimacy." [9]

Other commentators take the position that some nonfamilial associations are protected. *See, e.g.*, Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1886 (1984). Thus, Professor Linder states that

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[9] Professor Marshall goes on to argue that certain cultural affiliations, such as all-Irish or all-Jewish organizations, but not all-male organizations, should be protected, but states that "the organizations most likely to become the targets of state antidiscrimination efforts, such as civic, eating, service, athletic, and country clubs, are also the least likely to have a protectable constitutional interest." Marshall, *Discrimination and the Right of Association*, 81 Nw.U. L. Rev. 68, 84 (1986).

> "a state university regulation prohibiting single-sex organizations would be constitutionally suspect as applied to college fraternities or sororities. State regulation of private bridge clubs . . . probably would be of even more dubious constitutionality." *Ibid.*[10]

Whatever the scope of freedom of intimate association under the federal constitution, there is little support in cases or commentary for the notion that the right extends to a sizable all-male organization devoted to playing golf. There is even less support for the idea that the right would extend to protect that type of organization from the sort of governmental interference complained of here. If relationships are viewed along a continuum from most to least intimate with the most intimate (*i.e.*, the family) having the greatest protection from interference by the State, we shall assume, for purposes of this case, that the Burning Tree Club is a more intimate organization than the Jaycees or Rotary, and that it may be protected from certain types of regulation which could be imposed upon the latter organizations. The particular government interference complained of here, however, is not as great as the interference at issue in *Roberts* and *Rotary Club*. In the present case, the State will simply withdraw a benefit from the club if it continues to discriminate, thereby placing the club on the same footing as comparably situated landowners. Under the case law dealing with organizations' claims of constitutionally protected intimate associational rights, Ch. 334 would not appear to burden unconstitutionally any intimate associational rights of Burning Tree's members.

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[10] *But see*, Comment, *College Social Organizations*, 75 Calif. L. Rev. 2117 (1987), arguing that collegiate fraternities are not sufficiently intimate to warrant protection, and Note, *Private Club Discrimination Can Be Outlawed: Roberts v. United States Jaycees*, 19 U.S.F. L. Rev. 413, 425 (1985), stating, "it is unlikely that any membership organization could provide the relationships or activities of the intensely private nature protected by the freedom [of intimate association]."

B.

Burning Tree argues that the State is unconstitutionally withdrawing a benefit from the club, which is otherwise qualified to receive it, as a punishment for the club's exercise of its constitutional right of association. In making this contention, Burning Tree relies on two cases, *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In our view, and regardless of whether Burning Tree's argument is viewed as resting on freedom of expressive association or on freedom of intimate association, neither *Speiser* nor *Perry* supports Burning Tree's position.

In *Speiser*, the Supreme Court held unconstitutional California's practice of denying state tax exemptions to veterans who declined to take the loyalty oath. The exemptions were otherwise available to all veterans under California law. In striking down the California policy, the Court stated (357 U.S. at 519, 78 S.Ct. at 1338):

> "[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.' *American Communications Assn. v. Douds*, *supra* at 402."

In *Perry v. Sindermann*, *supra*, 408 U.S. at 597, 92 S.Ct. at 2697, the Court held that a state government could not refuse to renew a teacher's contract solely because of his protected speech outside the classroom, as a government

> "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or

> associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible."

While these cases stand for the proposition that the government generally may not deny benefits to persons because of the content of their speech, they are obviously distinguishable from the present case. In both *Speiser* and *Perry*, the state's action had a direct, chilling effect on the content of an individual's speech. In this case, the government is merely removing a tax benefit because of the club's discriminatory policies. No First Amendment free speech right is involved in the present case. We are unaware of any decision suggesting that the reasoning of *Speiser* and *Perry* extends to circumstarces like those now before us.

A more analogous case is *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971). In *Green*, the United States District Court upheld the denial of tax-exempt status to racially discriminatory private schools against a challenge that the denial violated the schools' associational rights. The court distinguished *Speiser* in language equally applicable to the present situation (330 F. Supp. at 1166-1167):

> "*Speiser* involved an affirmative requirement imposed as a condition of obtaining the tax exemptions provided for veterans by the state constitution. A statute made qualification for the exemption dependent on the filing of an oath that the applicant did not advocate the overthrow of the Government by force, violence or other lawful means. Although the statute was construed by the state court to deny exemptions only to claimants who engage in speech

that may constitutionally be punished, it was enforced through procedures, placing the burdens of proof and persuasion on the taxpayers, that denied the procedural safeguards required by the due process clause, and were held to interfere with the veterans' present freedom of speech.

"In the case before us exemptions and deductions would be denied not on account of beliefs and associations but on account of acts and practices constituting discrimination among students on account of race—acts contrary to a national policy that has constitutional ingredients. If schools sincerely terminate those harmful activities they may obtain the exemption. In *Speiser* the statutory scheme was offensive because it operated to chill speech that was permissible, because of fears that the veterans might be unable to establish its permissibility. It is not remotely suggested by intervenors that they fear lest their schools will undertake only activities that are innocent, *i.e.*, not racially discriminatory, yet be wrongly condemned as discriminatory. *Speiser* certainly does not hold that a government acts impermissibly in withholding tax benefits from one who engages in activities that are reasonably and constitutionally deemed contrary to the government's policy."

As in *Green*, the denial of tax benefits in the present case is not based on "beliefs and associations, but on account of acts and practices constituting discrimination."

Furthermore, the connection between the denial of a government benefit and the protected activity is not as direct in the present case as it was in *Perry* and *Speiser*. In those cases the government benefit was available as a matter of course to all similarly situated individuals. In *Speiser*, all veterans were entitled to the tax exemption; in *Perry*, teachers routinely retained their teaching posi-

tions. In both cases the denial of the government benefit left the plaintiffs substantially disadvantaged in comparison with those similarly situated. In the present case, the tax benefit which Burning Tree enjoys is not generally available to comparable landowners. Thus, the removal of Burning Tree's benefit, rather than uniquely disadvantaging Burning Tree, simply puts the club on an equal footing with comparably situated landowners. The less direct the connection between the denied government benefit and the protected activity, the less likely it is that the denial violates the associational rights claimed by the party to whom the benefit is denied.

In *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), the Supreme Court upheld the Internal Revenue Service's denial of tax-exempt status to organizations engaged in lobbying, rejecting Taxation With Representation's argument that the IRS' action denied the organization a benefit because of the exercise of First Amendment rights. The Court specifically distinguished *Speiser* and *Perry*, saying (461 U.S. at 545, 103 S.Ct. at 2001):

> "TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model. The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys."

As in *Regan*, the State in the present case is not punishing or prohibiting the exercise of any associational

rights which Burning Tree's members might possess. The State is simply declining to subsidize any organization that engages in certain discriminatory activities. Just because Burnng Tree's members may have associational rights does not oblige the State to subsidize the exercise of those rights.[11]

Other cases also support the view that a private entity's protected associational rights do not entitle the entity to government subsidies or endorsement of its activities. In *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), the Supreme Court rejected a claim that applying Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, to a law firm's hiring practices would infringe the firm members' rights of association, saying: "Invidious private

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[11] Lyng v. International Union, UAW, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988), reiterates this principle. In *Lyng* the Court upheld an amendment to the federal Food Stamp Act which denied food stamps to households where a member was on strike. The amendment was challenged as denying union members' freedom of association. The Court rejected the challenge saying, "the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." 108 S.Ct. at 1190. The Court distinguished cases in which it had found that state practices violated First Amendment associational rights, as in NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The Court said (108 S.Ct. at 1190 n.5, 99 L.Ed.2d at 389 n.5):

> "Exposing the members of an association to physical and economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms than does the withdrawal of a government benefit based not on membership in an organization but merely for the duration of one activity that may be undertaken by that organization."

In the instant case, the government benefit is being denied, not because of membership in an organization, but because of Burning Tree's current discriminatory practices.

discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative constitutional protection," quoting *Norwood v. Harrison*, 413 U.S. 455, 470, 93 S.Ct. 2804, 2813, 37 L.E.2d 723 (1973). In *Norwood* itself the Court rejected an argument that Mississippi was required to provide the same amount of assistance to private schools that it provided to public schools, regardless of whether the private schools practiced racial discrimination. The Court said (413 U.S. at 462-463, 93 S.Ct. at 2809):

> "[A] State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination."

These cases make it clear that governments are under no obligation to sanction, subsidize or support discrimination by private entities, and that the failure to subsidize discriminatory entities does not unconstitutionally burden their associational rights.

Finally, to whatever extent the State's denial of a preferential tax assessment is viewed as a burden on Burning Tree's members' rights of association, the State has a compelling interest justifying the imposition of such a burden. The Supreme Court has recognized that restricting associational rights "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees, supra*, 468 U.S. at 623, 104 S.Ct. at 3252.

In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the Supreme Court upheld the Internal Revenue Service's denial of tax-exempt status to racially discriminatory religious schools, saying, "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." 461 U.S. at 604, 103 S.Ct. at 2035, 76 L.Ed.2d at 181.

The State of Maryland, as reflected in its Equal Rights Amendment and the numerous cases construing it, has made a commitment to equal rights for women which elevates the goal of eliminating state supported sex discrimination to a compelling state interest. That compelling interest outweighs whatever burden this tax assessment legislation may have imposed on Burning Tree's associational rights. Furthermore, the State's method of satisfying its interest is narrowly tailored to fulfill that purpose and is no more restrictive of associational freedoms than is necessary.

V.

We now turn to Burning Tree's E.R.A. challenge to Ch. 334. Burning Tree asserts that it has standing to bring this challenge under the E.R.A., that the periodic discrimination provision of Ch. 334 violates the E.R.A., and that the provision is not severable from Ch. 334's prohibition against sex discrimination. The State argues that Burning Tree lacks standing to bring an E.R.A. challenge, that the periodic discrimination provision does not violate the E.R.A., and that, if it does, the provision is severable from the remainder of Ch. 334. We agree with Burning Tree that it has standing to bring the challenge and that the periodic discrimination provision

violates the E.R.A. We agree with the State, however, that the provision is severable from the remainder of Ch. 334.

A.

The State maintains that neither Burning Tree nor its individual members have standing to raise an E.R.A. challenge. First, the State reasons that the E.R.A. creates purely personal rights which cannot be asserted by a corporation like Burning Tree. Second, the State argues that the club and its individual members lack standing as taxpayers because they suffer no direct injury from the periodic discrimination provision. According to the State, Burning Tree and its members are trying to "leapfrog" or "bootstrap" standing in the hope that, if the periodic discrimination provision is ruled unconstitutional, it will also be held not severable from the remainder of the statute.

With regard to the State's argument that a corporation cannot bring an E.R.A. claim other than in its capacity as a taxpayer, it has been said that whether constitutional protections are available to corporations as well as individuals "depends on the nature, history, and purpose of the particular provision." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n. 14, 98 S.Ct. 1407, 1416-1417, 55 L.Ed.2d 707 (1978). We note that this Court has entertained E.R.A. challenges brought by corporate entities. *See Condore v. Prince George's County*, 289 Md. 516, 425 A.2d 1011 (1981); *Massage Parlors, Inc. v. City of Balto*, 284 Md. 490, 398 A.2d 52 (1979). In neither of those cases, however, was the question of standing raised before this Court. Because the parties in this case include two individual members of Burning Tree, who can certainly raise an E.R.A. challenge, and because we hold that both Burning Tree and its members have taxpayer standing to challenge Ch. 334, we need not decide whether the club would otherwise have standing to bring this suit.

Under Maryland law, the doctrine of taxpayer standing is not as narrowly limited as it is under the law of some jurisdictions.[12] "In Maryland, taxpayers have standing to bring suit to challenge the constitutionality of a statute when the statute as applied increases their taxes." *Murray v. Comptroller*, 241 Md. 383, 391, 216 A.2d 897, 901, *cert. denied*, 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed.2d 55 (1966). *See Inlet Associates v. Assateague House*, 313 Md. 413, 440-441, 545 A.2d 1296, 1310-1311 (1988). In the instant case the State, acting pursuant to Ch. 334, has taken steps to increase the tax liability of Burning Tree by over $300,000. Clearly, Ch. 334 as applied increases Burning Tree's tax burden.

The State argues, however, that Burning Tree and its members lack standing because, according to the State, they suffer no direct tax injury from the challenged periodic discrimination provision. The State's position is factually incorrect. Burning Tree's tax burden is, indeed, greater as a result of the allegedly unconstitutional tax exemptions granted to other country clubs by the periodic discrimination provision. *See, e.g., Murray v. Comptroller, supra*, 241 Md. at 391, 216 A.2d at 901-902, in which a taxpayer was accorded standing to challenge allegedly unconstitutional tax exemptions given to others.

More generally, there is no requirement in Maryland law that the tax injury suffered in order to gain taxpayer standing must flow directly from the challenged portion of the statute. The State cites no Maryland case holding that a taxpayer, whose tax burden is increased by a statute, lacks standing to challenge that statute in its entirety when the allegedly unconstitutional portion does not, by itself, directly increase his tax burden.

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[12] *Cf.* United States v. Richardson, 418 U.S. 166, 180, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (Powell, J., concurring); Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Our decisions have not required the close nexus between the challenged portion of a statute and the tax burden incurred by the plaintiff which the State argues for here. All that we have required is that the taxpayers' tax burden be increased, or even threatened to be increased, by the challenged law.

Somewhat analogous to the present case is *Citizens Planning and Housing Ass'n v. County Executive*, 273 Md. 333, 329 A.2d 681 (1974), in which taxpayers were held to have standing to challenge the County Executive's reorganization of the Office of Planning and Zoning. The plaintiffs alleged that the county executive's acts violated the separation of powers provision in a county's charter. This Court accorded them standing even though they were clearly not directly injured by the county executive's alleged violation of separation of powers. Rather they were indirectly injured in that the county executive's alleged violation arguably led to inefficient government operations, thereby raising taxes. *See also James v. Anderson*, 281 Md. 137, 377 A.2d 865 (1977).

Similarly, in *Gordon v. Baltimore*, 258 Md. 682, 267 A.2d 98 (1970), this Court held that a taxpayer had standing to challenge Baltimore City's acceptance of library books in violation of the terms of a gift. Even though the plaintiff was not directly affected by the illegal act, he was given standing because the City's action might increase his tax burden.

The cases in this Court generally stand for the principle that a taxpayer has standing to challenge a statute's constitutionality upon a showing that the statute, as applied, actually or potentially increases the plaintiff's tax burden. Therefore, Burning Tree has standing to challenge the periodic discrimination provision.

B.

The E.R.A. states: "Equality of rights under the law shall not be abridged or denied because of sex." In de-

ciding whether Ch. 334 violates the E.R.A., we employ an analysis similar to that used in *Burning Tree Club. v. Bainum, supra.* We must first determine whether state action is present and, if so, whether the periodic discrimination provision abridges equality of rights on the basis of sex.

All of the opinions in *Burning Tree v. Bainum* took the position that a finding of state action is necessary in order for there to be a violation of the E.R.A. 305 Md. at 73, 501 A.2d at 827 (Murphy, C.J.), 305 Md. at 86, 501 A.2d at 833-834 (Rodowsky, J.), 305 Md. at 90, 501 A.2d at 836 (Eldridge, J.). The State suggests that "'state action' is more difficult to find" in the enactment of Ch. 334 because Ch. 334 "does not confer a tax break 'pursuant to a statutorily created state administrative proceeding, in which it is determined that the private party is engaged in statutorily sanctioned sex discrimination.'" (State's brief, p. 25).

In *Bainum*, however, a majority of this Court took the position that the enactment of legislation which on its face draws classifications based on sex is state action sufficient to invoke the E.R.A. Thus, Judge Rodowsky wrote: "[T]he General Assembly has included in Ch. 870 a prohibition against discrimination based on sex. That legislation is state action. Obviously the equality 'under law' which the E.R.A. guarantees embraces an enactment by the General Assembly." 305 Md. at 86, 501 A.2d at 833-834. Similarly, Judges Eldridge, Cole and Bloom expressed the view that "Ch. 870 on its face expressly draws classifications which implicate the E.R.A." 305 Md. at 92, 501 A.2d at 837. Ch. 334 in this case, as did Ch. 870 in *Bainum*, draws explicit distinctions based on sex. The statute distinguishes between sex discrimination and other types of discrimination, as well as between periodic gender-based discrimination and total gender-based discrimination. Thus, the enactment of Ch. 334 is itself state action.

As to whether the periodic discrimination provision abridges equality of rights because of sex, the analytically indistinguishable *Bainum* case, once again, is our guidepost. In that case Judge Rodowsky found the primary purpose provision unconstitutional on its face because it "single[d] out for special exception from an otherwise uniformly applicable anti-discrimination measure private discrimination of a certain type—sex—and to a certain degree—total—which neither the State nor a private club receiving a tax exemption could otherwise practice." 305 Md. at 85, 501 A.2d at 833. Judges Eldridge, Cole and Bloom expressed the same view, stating that Ch. 870 was fatally flawed in drawing

> "an express distinction between race, color, creed and national origin discriminations on the one hand, and sex discrimination on the other hand. It also expressly distinguishes between two types of sex discrimination, allowing sex discrimination when it is the 'primary purpose' of the club and disallowing it in other situations." 305 Md. at 92, 501 A.2d at 837 (Eldridge, J.).

Ch. 334 fails in exactly the same way that Ch. 870 did. On its face Ch. 334 makes classifications using sex as a factor. First, the statute distinguishes between sex discrimination and other types of discrimination. Second, the statute creates a classification that distinguishes between discrimination on the basis of sex which is periodic (permitted) and discrimination on the basis of sex which is total (prohibited). Indeed, Judge Rodowsky's opinion in *Bainum* expressly stated that the periodic discrimination provision was invalid for the same reasons as the primary purpose provision. 305 Md. at 87, 501 A.2d at 834.

As the earlier *Bainum* case made clear, the burden of justifying these classifications falls upon the State. The level of scrutiny to which the classifications are subject is "at least the same scrutiny as racial classifications."

305 Md. at 98, 501 A.2d at 840). The State's justifications for the statute are that: (1) there has been no showing that "a substantial discrimination" is at issue; (2) the periodic discrimination provision permits such activities as "all-male or all-female member guest tournaments and professional-amateur tournaments for women or men only"; and (3) physical differences between men and women might affect the speed of their respective golf games, thereby justifying separate playing times in order to maximize efficient use of the golf facilities. (State's brief, pp. 23-28).

The State's first argument is without merit. The "periodic discrimination" provision, on its face, permits the segregation of facilities on the basis of sex. Plainly, under prior holdings of this Court, state action providing for segregation based upon sex, absent substantial justification, violates the E.R.A., just as segregation based upon race violates the Fourteenth Amendment. *See Burning Tree Club v. Bainum, supra*, 305 Md. at 95-98, 501 A.2d at 838-840. We reject the State's views that only a "substantial" discrimination requires justification of the State, and that there was no substantial discrimination shown in this case. Any statute which discriminates on the basis of sex requires justification. The E.R.A. "absolutely forbids the determination of such 'rights,' as may be accorded by law, solely on the basis of one's sex." *Burning Tree Club v. Bainum, supra*, 305 Md. at 70, 501 A.2d at 825 (Murphy, C.J.).

The State's arguments that Ch. 334 is justified because it permits all-male and all-female sports events and because it recognizes distinctions in the golf abilities of men and women are also unpersuasive. We need not here decide whether single-sex golf tournaments or similar practices, which the State would deem insubstantial, are permissible under the E.R.A. Nothing in the statute narrowly confines the permitted sex discrimination to such practices. In fact, single-sex golf tournaments may not

even be encompassed by the periodic discrimination provision, which relates to excluding members of one sex on a "day" or "time" basis but not an "event" basis. The statute, on its face, permits a club to engage in periodic sex discrimination in any of its facilities for any reason at all. It would permit the exclusion of women, for example, on four or five days of the week, just so the exclusion is not for all seven days. In order to justify a racially or sexually discriminatory statute, it is not enough for the State to claim legitimate interests which it seeks to further. Under strict scrutiny, legislation must be narrowly tailored and precisely limited to achieving those legitimate ends. In an equal protection context, the Supreme Court said in *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972):

> "It is not sufficient for the State to show . . . a very substantial state interest. In pursuing that important interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision . . . and must be 'tailored to serve their legitimate objectives . . . . And, if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference."

Consequently, we conclude that the periodic discrimination provision of Ch. 334 violates the E.R.A.

C.

The final issue is whether the periodic discrimination provision is severable from the remainder of Ch. 334. Resolving questions of severability "involves ascertaining what would have been the intent of the Legislature had the partial invalidity been known." *Burning Tree Club*

v. Bainum, supra, 305 Md. at 82, 501 A.2d at 832 (Murphy, C.J.). Certain principles are pertinent in determining that intent. One is the strong presumption "that a legislative body generally intends its enactments to be severed if possible." *O.C. Taxpayers v. Ocean City*, 280 Md. 585, 600, 375 A.2d 541, 550 (1977). *See also Turner v. State*, 299 Md. 565, 576, 474 A.2d 1297, 1303 (1984); *Cities Service Co. v. Governor, supra*, 290 Md. at 575, 431 A.2d at 675. A second principle is that, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Davis v. State*, 294 Md. 370, 384, 451 A.2d 107, 114 (1982). *See also, Turner v. State, supra*; *Cities Service Co. v. Governor, supra.*

In *Burning Tree Club v. Bainum, supra*, the majority concluded that it was not "the dominant purpose of the General Assembly . . . to enact a bar against sex discrimination which was to operate absent the primary purpose provision." 305 Md. at 83, 501 A.2d at 832. The legislative history of Ch. 334, on the other hand, clearly shows that the "dominant purpose" of the General Assembly in enacting Ch. 334 was to reinstate sex as a prohibited basis for discrimination, regardless of the validity of the periodic discrimination provision.

Ch. 334 was introduced as S.B. 483 by Senator Bainum, a plaintiff in the *Burning Tree Club v. Bainum* case. As initially introduced the bill restored the language prohibiting sex discrimination which this Court struck down in *Bainum*. There was originally no periodic discrimination provision. On February 28, 1986, the Attorney General's office wrote to Senator Bainum in response to his request for an opinion as to the constitutionality of a bill containing the periodic discrimination provision. The Attorney General's letter stated that S.B. 483 would not be rendered unconstitutional by the periodic discrimination provision. The Attorney General reasoned that

> "the 'periodic discrimination' provision was not challenged in the [*Bainum*] litigation and thus was not declared invalid. Thus, presumably it is still a part of existing law—although in a dormant state because it is an exception to a ban on sex discrimination that has been declared invalid and presently unenforceable. The proposed amendment to Senate Bill 483 would not reintroduce into the law the 'periodic discrimination' provision. It would simply leave in the law a provision that is already there and that has not yet been definitely judicially scrutinized."

Although the Attorney General's analysis of *Bainum*'s disposition of the periodic discrimination provision was incorrect,[13] the General Assembly did follow the Attorney General's advice. This shows that the inclusion of the periodic discrimination provision, rather than a dominant legislative purpose, was simply intended to be a reenactment of "a provision that is already there."

In a favorable Committee Report on Senate Bill 483, which became Ch. 334, the Bill's purpose was described as

> "reinstat[ing] in the law the prohibition on sex discrimination by country clubs who receive the preferred country club assessment on their real property. The bill does this by removing the exemption to the prohibition. This exemption to the prohibition is that the primary purpose of the clubs may be . . . serving or benefiting members of a particular sex.
>
> "Last December the Court of Appeals utilizing the severability concept struck down the prohibition on discrimination on account of sex, because it had the exemption for country clubs. This is the severability concept used by the courts, and it is the subject addressed in this bill."

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[13] Chief Judge Murphy's opinion in *Bainum*, announcing the judgment of the Court, pointed out that the periodic discrimination provision of Ch. 870 fell, along with the primary purpose provision and the ban on sex discrimination. 305 Md. at 84, 501 A.2d at 832.

This statement makes clear that the dominant purpose of the enactment was restoring the prohibition against sex discrimination. The failure to mention the periodic discrimination provision in the Report confirms that the General Assembly did not view the provision as an important addition.

In a May 7, 1986, letter from the Attorney General to the Governor, prior to his signing Ch. 334 into law, the Attorney General expressed the view that the periodic discrimination provision would be severable. The Attorney General reiterated his view as to the *Bainum* decision's effect on the periodic discrimination provision and stated as follows (emphasis added):

> This letter [of Feb. 28] was distributed to members of the Senate Budget and Taxation Committee and the Counsel to the General Assembly appeared before the Committee on February 28, 1986 to explain the advice. At that time, *the Committee Chairman specifically asked whether Senate Bill 483 would be severable from the periodic discrimination exemption and was advised that it would be.* The severability issue was also raised when Senate Bill 483 was before the House Ways and Means Committee . . . as members debated whether an amendment to the bill was needed to insure its constitutionality. . . . After the February 28, 1986 letter of advice was distributed to committee members, the decision was apparently reached that it was not necessary to amend the bill or add a severability clause . . . .
>
> * * * *
>
> "In light of this legislative history, it is our opinion that Senate Bill 483 is constitutional and would be severable from the periodic discrimination provision of § 8-214 . . . ."

The General Assembly's being informed that the periodic discrimination provision would be severable, further but-

tresses the conclusion that the dominant purpose of Ch. 334 was to prohibit sex discrimination, regardless of the presence or absence of the periodic discrimination provision is invalid and severable. The prohibition against sex discrimination in § 8-214 of the Tax-Property Article remains viable and applicable to Burning Tree.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED, AND CASE REMANDED TO THAT COURT FOR THE ISSUANCE OF A DECLARATORY JUDGMENT IN ACCORDANCE WITH THIS OPINION. PLAINTIFFS TO PAY COSTS.

IN THE COURT OF APPEALS OF MARYLAND

No. 106

September Term, 1987

STATE OF MARYLAND, *et al.*

v.

BURNING TREE, INC., *et al.*

MURPHY, C.J.
ELDRIDGE
COLE
RODOWSKY
MCAULIFFE
ADKINS
BLACKWELL, JJ.

Dissenting opinion by McAuliffe, J.,
in which Murphy C.J. joins.

Filed: March 8, 1989

McAuliffe, J., dissenting.

I.

Burning Tree contends in this case, contrary to its original position in *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985) (*Burning Tree I*) that the so-called "periodic discrimination" provision violates the E.R.A. It does so in light of the majority view of *Burning Tree I* that the "periodic discrimination" provision violated the E.R.A. Of course, Burning Tree's position in this respect is taken, not from conviction that *Burning Tree I* was correct, but rather to lay the underpinning for its argument that the "periodic discrimination" provision cannot be severed from the remainder of Chapter 334 and, hence, the entire act is unconstitutional.

The E.R.A. declares that "[E]quality of rights under the law shall not be abridged or denied because of sex." I agree with the position taken by Chief Judge Murphy in announcing the judgment of the Court in *Burning Tree I*, in which Judges Smith and Orth concurred. There, he recognized that the E.R.A. was prompted by the long history of denial of equal rights for women. The E.R.A., he said, "flatly prohibits gender-based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, rights and responsibilities as between men and women." 305 Md. at 64. He pointed out that our cases, and those of other jurisdictions having similar E.R.A. provisions in their constitutions, clearly indicate that they prohibit *unequal* treatment imposed by law as between the sexes. *Id.* at 70. He noted that these cases shared a common thread—"they generally invalidate governmental action which imposes a burden on one sex but not the other, or grants a benefit to one but not the other." *Id.* The equality between the sexes mandated by the E.R.A., he said, is of "rights" of individuals "under the law," as to which the

E.R.A. absolutely forbids their determination solely on the basis of one's sex. *Id.* In this formulation there must be a denial or abridgement of equal rights under the law as between men and women, absent which the E.R.A. has no application.

In enacting Chapter 334, and including the "periodic discrimination" provision as an exception to the general proscription against sex discrimination in the granting by country clubs of "membership and guest privileges," the legislature manifestly determined that it was not inconsistent with the E.R.A. or with the general prohibition against sex discrimination, to permit, on an equal basis, the exclusion of one sex, or the other from the club's activities or facilities "on specific days or at specific times." The obvious purpose of this provision—one of long duration in the operation of country clubs which antedates by many years the enactment of the E.R.A.—is to permit country clubs participating in the open space program to hold "men's or women's golf or tennis tournaments, or to . . . [permit] men's or women's days or times on the course or courts, or to otherwise . . . [permit] the continuance of time allocations that traditionally had been treated as reasonable and non-discriminatory even though based on sex classification."

Plainly the exception does not smack of a nefarious state-sponsored scheme invidiously discriminate against men or women solely on account of their sex; it simply does not apportion or distribute benefits or burdens unequally among the sexes within the contemplation of the E.R.A.

Of course, I recognize that a statutory provision, although couched in gender neutral terms, may be applied in an *invidiously* discriminatory manner and thus constitute a violation of the E.R.A. While I agree with the Court that the provision could have been more narrowly and artfully drawn, it is not *facially* at odds with

the E.R.A. In my view, neither the legislature in proposing the E.R.A. or the people in adopting the amendment ever dreamed that it would be taken to such extreme lengths as to, in effect, virtually mandate a form of "togetherness" desired by neither sex. Such an interpretation, I think may well threaten to undermine the continuing acceptance of the E.R.A. itself, a dreadful result indeed.

II.

If the "periodic discrimination" provision is unconstitutional, I do not agree that it is severable from the remainder of the statute.

The majority recites, and then relies upon, the principle that "a legislative body generally intends its enactments to be severed if possible." Majority opinion at [59]. That is a valid principle, and it is backed up by Article 1, § 23, Maryland Code (1957, 1987 Repl. Vol.). What the majority here apparently overlooks, but what a different majority did not overlook in *Burning Tree I*, is that the principle does not apply when the invalid portion of a statute is an exception to a prohibition.

> A long established principle of statutory construction in determining severability questions, is that where the Legislature enacts a prohibition with an excepted class, and a court finds that the classification is constitutionally infirm, the court will ordinarily not presume that the Legislature would have enacted the prohibition without the exception, thereby extending the prohibition to a class of persons whom the Legislature clearly intended should not be reached. *Burning Tree I*, 305 Md. at 82, quoting from *State v. Schuller*, 280 Md. 305, 319, 372 A.2d 1076 (1977).

To the same effect, *see* 2 Sutherland *Statutory Construction* § 44.13 (4th ed.), stating:

> When an exception, exemption, proviso, or any clause which limits the scope of an act's applicability is found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the scope of the act has been widened and therefore cannot properly represent the legislative intent. To extend the scope of an act's operation by invalidating a proviso of limitation while allowing the remainder to continue in effect invites criticsm on the ground that it amounts to judicial legislation. (footnotes omitted).

During the 1988 session of the General Assembly, after this Court had made clear that this was the law followed in Maryland, House Bill 844 was introduced to amend Art. 1, § 23 of the Maryland Code by adding the following language:

> The presumption of severability of statutes under this section applies even if the invalid portion of a statute is an exception to a prohibition.

The bill did not pass. The law remains as it was. The first part of ch. 334 constituted a general prohibition of the practice of discrimination. The second part may be considered an exception to the general prohibition. There is, therefore, no presumption of severability in this case.

The presumption, even when applicable, serves only as an aid in determining probable legislative intent. And, as this Court pointed out in *O.C. Taxpayers v. Ocean City*, 280 Md. 585, 375 A.2d 541 (1977), we look not to the actual intent of the legislature in passing the statute, but rather to what would have been the intent of the legislative body if it had known that the statute could be only partially effective. In the context of the case before us, the question is whether the legislature would have imposed the absolute ban of the first section of the statute had it known that the exception in the second

section would be declared invalid. I cannot say with any confidence that the legislature would have done so, and therefore I decline to legislate by the scalpel of severance.

I am struck by the fact that when the legislature considered ch. 334 in 1986, it had just been through this entire exercise with the same statute. By ch. 870 of the Acts of 1974, the legislature had imposed upon participating country clubs a general prohibition against discrimination, immediately followed by exceptions for clubs primarily intending to benefit a particular sex, and clubs which excluded certain sexes only on certain days and at certain times. On December 23, 1985, just prior to the opening of the 1986 session of the General Assembly, this Court held the primary purpose exception was unconstitutional and, specifically stating that the Court would not indulge a presumption of severability when the invalidated statute was an exception to a general prohibition, refused to sever. The Court said that "severing the primary purpose provision would make the prohibition against sex discrimination operate as to single-sex country clubs and thereby enlarge [the] prohibition beyond its reach as enacted." *Burning Tree I*, 305 Md. at 82. Six weeks later, the bill we now consider was introduced. It is inconceivable to me that the legislature could have misunderstood the clear language of *Burning Tree I* when it set about "fine tuning" the exception in an effort to make it constitutional. The legislature did not make a radical change in an effort to escape this Court's decision of non-severability. Quite the contrary, it employed the same approach it had previously taken, simply deleting the primary purpose clause from the exception. If ever a legislative body had a right to believe that if its second attempt at defining an exception also proved lacking, it simply would be sent back to the drafting board, and not suffer the enactment of a prohibition far more sweeping than it had approved, it was the General Assembly of 1986.

The exception in Chapter 334 was intended, I believe, to be an integral part of the bill. Its genesis does not date to the drafting of the 1986 Act, but to a Senate amendment to the 1974 Act. The legislators apparently did not wish to pass a bill that would preclude country clubs from holding men's or women's golf or tennis tournaments, or from establishing men's or women's days or times on the course or courts, or to otherwise proscribe the continuation of time allocations that traditionally had been treated as reasonable and nondiscriminatory even though based on sex classification. When the 1974 Act was declared unconstitutional, and Senate Bill 483 was introduced, the exception was included in the original draft. Constituents then reminded their representatives of the need for the exception.[1] The Senate Budget and Taxation Committee Floor Report assured the membership that passage of the bill would not affect the ability of the clubs to "have such activities as men's/women's days or tournaments." Every member of the 1986 General Assembly voting for Senate Bill 483 had the right to assume that the bill would either survive as a whole or fail as a whole, and to be confident that we would not rewrite their legislation into the unlimited prohibition they had twice attempted to avoid.

The method by which the legislature structured the exception is also significant. It did not say, as the majority suggests by the use of the term "periodic discrimination," that discrimination was generally proscribed but that certain discrimination would be permitted. Instead, the legislature proscribed discrimination based on sex, and then defined discrimination so as not to include exclusion of either sex on specific days or at specific times. The prohibition of "discrimination based on sex" in sub-

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[1] *See, e.g.*, the letters of Doctor Luther Gray, past president of Congressional Country Club, and Mr. Jerome Powell on behalf of the Chevy Chase Club, contained in the record of the legislative history of Senate Bill 483, Department of Legislative Reference.

section (a) is no broader than the specific definition of that term contained in subsection (b). I can think of no more obvious way to change the intent of the legislature than to judicially excise the limiting definition while leaving the balance of the statute intact.

Whether the legislature would have enacted Senate Bill 483 with no limiting definition of what it meant by sexual discrimination is entirely conjectural. The system of property tax assessment agreements that this legislation would affect is obviously perceived as beneficial to the State and its political subdivisions. In addition to the preservation of open spaces, there are obvious economic advantages that I believe the legislature could find significantly outweigh the tax concessions made. The history of this legislation indicates that the General Assembly did not wish to impose unnecessary and unwanted restrictions on country clubs, or to unnecessarily disturb an arrangement that is of benefit to the State. My best judgment is that if made aware the exception was overly broad, the legislature would have attempted to spell out an exception that would largely comport with existing practices of the country clubs and at the same time satisfy this Court's legitimate concern with overbreadth. I cannot say with any measure of confidence that the legislature would have passed this bill without the definition subsection that spelled out its true intent, and I therefore respectfully dissent from the holding that the statute is severable.

Chief Judge Murphy joins in this opinion.

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

Case No. 3108902

BURNING TREE CLUB, INC.,
Plaintiff

v.

STATE OF MARYLAND, *et al.*,
Defendants

MEMORANDUM OPINION

This case is a continuing effort by Burning Tree Club, Inc. (hereafter "Burning Tree" or "the club") to preserve a favorable tax assessment. Burning Tree is taxed on the actual use of its land, based on a contract entered into with the State of Maryland under the Maryland Code Tax-Property Article, Sections 8-212 through 8-218. Burning Tree has now filed a Complaint for Declaratory Judgment and Final Injunction in an attempt to maintain its lower tax rate.

In its amended complaint, the Plaintiff raises six separate issues. The Court, in its opinion, will respond to each issue raised by the club. The principal issue is whether Section 8-214 of the Tax-Property Article, as amended by Chapter 334, Laws of 1986, is constitutionally permissible.

FACTS

In 1965 the General Assembly enacted Chapter 399 of the Acts of 1965 which allowed for the granting of a lower tax assessment for any country club that agrees not to develop its land. (Code 1957, Art. 81 § 19(e); but now § 8-212 - 8-218 of the Tax-Property Article).

The law remained the same until 1974 when in Chapter 870 the General Assembly made it illegal for any country club who discriminated in its admissions policies to receive a tax preference. The law made illegal to discriminate on the basis of race, color, creed, sex, or national origin, but the law provided an escape for those country clubs discriminating on the basis of sex. Specifically § 8-214(b) stated:

> (b) Exceptions—If the facilities of a country club that meets the qualifications of § 8-212 of this subtitle are operated with the primary purpose of serving or benefiting members of a particular sex [this provision is known as the primary purpose exception] or if the country club excludes certain sexes on specific days or at certain times on the basis of sex [this provision is known as the periodic discrimination exception] the country club does not discriminate under subsection (a) of this section.

In 1985 the Court of Appeals ruled that the primary purpose exception violated the Maryland Constitution Declaration of Rights Article 46, commonly known as the equal rights amendment (E.R.A.). *Burning Tree Club v. Bainum*, 305 Md. 53 (1985). The Court did not rule on whether the periodic discrimination exception also violates the E.R.A. Ironically, it is now Burning Tree who comes before this Court to seek a declaratory judgment that the periodic discrimination exception is unconstitutional, under the E.R.A.

I. *Chapter 334 Applies Prospectively And Does Not Abrogate Burning Tree's Present Contract With The State*

Burning Tree, in Count 3 of its complaint, seeks a declaratory judgment that Chapter 334 applies prospectively; therefore, it would have no effect on the present contract with the State.

The Court must first consider, however, the State's Motion To Dismiss this portion of the complaint. The State believes there are certain administrative procedures that a taxpayer (Burning Tree) can use if it feels aggrieved by an assessment decision. The Tax-Property Article allows a taxpayer a hearing before the Supervisor of Assessments, the Property Assessment Tax Appeals Board, the Maryland Tax Court, and the Circuit Court, to protest an unlawful assessment. *See* Tax-Property Article § 14-502, § 14-509, § 14-512 and § 14-513. The State argues that before the Court can decide if Chapter 334 applies to Burning Tree's assessment agreement, the Plaintiff must exhaust all of its administrative remedies under the Tax-Property Article.

The Court disagrees with this position. Burning Tree is seeking a declaration from this Court as to the proper construction of Chapter 334 under the Declaratory Judgments Act:

> Any person interested under a deed, will, trust, land patent, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, administrative rule or regulation, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation, land patent, contract or franchise and obtain a declaration of rights, status, or other legal relations under it. *Courts and Judicial Proceedings Md. Code* § 3-406.

The Declaratory Judgments Act is to be liberally used and interpreted according to the Statute:

> This subtitle is remedial. Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It shall be liberally construed and administered. *Id.* § 3-402.

The Court accepts the State's argument that declaratory relief will not be allowed in those instances where the legislature has provided an exclusive statutory or administrative remedy. *Maryland-National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. 588, 595 (1978). The State believes an exclusive remedy was provided by the General Assembly in the Tax-Property Article § 14-502. This interpretation of the Statute, however, is incorrect. The Court of Appeals stated in the *Maryland-National Parks* decision that the Code (1957, 1975 Repl. Vol., 1977 Cum. Supp.) Art. 81 § 250, § 255 and § 256, the predecessors to Subtitle 5 of Title 14:

> . . . manifest a clear legislative intent to limit the jurisdiction of the tax agencies primarily to the review of decisions concerning the *assessment*, *valuation* and *classification* of real and personal property for tax purposes. Presumably, in enacting such an intricate and comprehensive mechanism for the review of property tax determinations, the General Assembly sought to afford the taxpaying public a systematic and efficient method of fact-finding and policy-formation in an area where many of the day-to-day problems of administration either lie beyond the conventional competence of the courts because of the technical complexity of the subject matter or, because of their routine nature, are not properly suited for resolution in formal adjudicatory proceedings. 282 Md. at 597. (Emphasis in original).

The present issue before the Court deals with statutory construction. It in no way concerns "assessment, valuation and classification of real and personal property for tax purposes." *Id.* Additionally, the problem of statutory construction is not one that lies "beyond the conventional competence of the courts because of the technical complexity of the subject matter." *Id.* There can be little doubt that it is the role of the courts to determine what

the law is. Chief Justice John Marshall resolved this issue in *Marbury v. Madison* by proclaiming: "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 135, 175 (1803).

At best, under *Maryland-National Parks*, the tax agencies have concurrent jurisdiction with the circuit court to hear this matter. This is not enough to bar this court from ruling on the complaint. Section 3-409(c) of the *Courts and Judicial Proceedings Md. Code* provides that the provision of concurrent remedies does not prohibit a party from seeking declaratory relief.

The Court must now decide if Chapter 334 applies prospectively. Section 8-214(a) of the Tax-Property Article, as amended by Chapter 334, states in part:

> . . . if a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on . . . sex . . . in granting membership or guest privileges, the country club may not make an agreement under this subtitle.

The Plaintiff believes the crucial language from this section, that a country club that discriminates based on sex "may not make" a tax deferral agreement with the State, applies only to future conduct. If this is true, then the statute would not affect the 50 year contract Burning Tree entered into on April 14, 1981.

Burning Tree is correct when it argues that the Court should presume the law to apply prospectively. The rule, as explained by the Court of Appeals, states that, "There is a general presumption in the law that an enactment is intended to have purely prospective effect. In the absence of clear legislative intent to the contrary, a statute is not given retrospective effect (citation omitted)." *Sekou Soumana Traore v. State of Maryland*, 290 Md. 585, 593 (1981). Relying on this general rule of statu-

tory construction and the language of the statute itself, Burning Tree argues that it is clear the statute should be applied prospectively only.

The State is not arguing that Burning Tree must retroactively pay back any of the deferred taxes. What it does argue, however, is that the club should be denied its tax break only for the years after July 1, 1986, the effective date of the statute. While this certainly deprives Burning Tree ofthe benefit of its contract signed prior to July 1, 1986, the State contends such retroactivity is permissible under *State Commission on Human Relations v. Amecom Div.*, 278 Md. 120 (1976).

In *State Commission*, the Court had to determine if a provision of the State's Human Relations Law enacted on July 1, 1975, was applicable to acts of discrimination occurring before that date. There was no expression of intent on this issue in the law. The Court ruled that the new statute could not be applied to individual acts of discrimination occurring before July 1, 1975, but the law does apply to employee contracts entered into before that date. The Court stated:

> "While it is true that the contractual right of the employer at will to terminate the employee at his pleasure accrues when the contract of employment is entered into, the purpose of Section 4 may only be adequately served by retroactive application with regard to the date of formation of the contract. For it is, perhaps, equally well settled that where prospective application of a law is inconsistent with the nature and purpose of the legislation, retroactive effect will be given. Citation omitted. The result of a construction of Section 4 giving it effect only with regard to contracts of employment entered into after July 1, 1975, would mean that an employee of long

> standing would find the Section 4 remedy unavailable while a new employee could receive its benefits. Such an absurd result could not have been intended and runs contrary to the purpose of the law." *State Commission*, 278 Md. at 127.

This Court believes a similar ruling is called for here. While the Legislature failed to state whether the law applies retroactively, the Court is not ignorant of the facts leading up to the passage of Chapter 334.[1] Chapter 334 became law within seven months of the Court of Appeals decision in *Burning Tree v. Bainum*. The suit was against Burning Tree, the only single sex country club receiving a tax deferment in the state. The new law deleted the primary purpose exception that the Court of Appeals declared unconstitutional. This provision applied only to single sex country clubs, i.e., Burning Tree. Based on these facts, it would be absurd indeed for this Court to rule that Chapter 334 applies prospectively. To do so would mean that the only single sex club receiving a tax deferment would be able to continue to receive such a benefit until the year 2031. This result could not have been intended by the General Assembly in light of its response to the *Burning Tree v. Bainum* decision.

Relying on the decision in *State Commission*, this Court rules that Chapter 334 does not apply retroactively to the tax break received by the Plaintiff from 1981 but the law would apply retroactively to the 1981 contract entered into by Burning Tree. To rule otherwise would be contrary to the purpose of the law.

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[1] The preamble to the law uses similar language, stating:

> FOR the purpose of repealing a certain exception to a prohibition against discrimination by country clubs in order to prevent country clubs that operate in certain ways with regard to members of a particular sex from making certain assessment agreements and from receiving certain property tax benefits. *Laws of Maryland 1986*, p. 1317.

Since the Court has found Chapter 334 to apply retroactively to Burning Tree's contract, it does not need to consider Count 2 of Plaintiff's complaint that the State has breached its contract with Burning Tree.

II. *Contract Clause—Burning Tree*

Although the language of the Contract Clause of the United States Constitution ("No State shall . . . pass any . . . law impairing the obligation of Contracts") is facially absolute, courts have never construed Article I § 10 Clause 1 as an absolute ban on impairment of contract by the State.

In 1983 in *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400 (1983) (*Energy Reserves*), the Supreme Court refined the standard of review for contract clause cases, articulating a three step test:

1. *Threshold inquiry*: "Whether the State law has, in fact, operated as a substantial impairment of a contractual relationship."

2. *Justification: Legitimate public purpose*: "If the state regulation constitutes a substantial impairment, the state, in justification, must have a significant and legitimate public purpose behind the regulation."

3. *Reasonable and necessary means*: "Once a legitimate purpose has been identified, the next inquiry is . . . the necessity and reasonableness of a particular measure." *Id.*, at 410-13).

The threshold inquiry, whether the state law has operated as a substantial impairment of a contractual relationship hinges predominantly on the reasonable or legitimate expectations of the parties to the contract

rather than mere quantitative loss therefrom.[2] Legitimate expectations have been assessed by the courts on several levels: the inherent police powers of the State implied in every contract, the past regulatory nature of the subject of the contract, and the retrospective-prospective nature of the impairment.

The contract clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereign powers. *Stone v. Mississippi*, 101 U.S. 814 at 817 (1880). "It is to be accepted as a commonplace that the contract clause does not operate to obliterate the police power of the states . . . Rather, the police power becomes an implied condition of every contract and, as such, as much part of the contract as though it were written into it." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 at 241 (1978), or, in other words, a legitimate expectation. *See also, East New York Savings Bank v. Hahn*, 326 U.S. 232 (1945).

The issue then becomes whether the State was acting within its police power to suppress sex discrimination when it statutorily disallowed Burning Tree's contractual preferential tax status.[3] A comparison of *Stone v. Mississippi*, 101 U.S. 814 (1880) and *United States Trust Co. v. N.J.*, 431 U.S. 1 (1977) is instructional in this regard. In *Stone*, the state legislature had given a company a twenty-five year lottery franchise. Three years

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[2] "Total destruction of contractual expectations is not necessary for a finding of substantial impairment . . . On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400 at 411 (1983). *See also United States Trust Co. v. N.J.*, 431 U.S. 1 at 26-27, 31 (1977) and *El Paso v. Simmons*, 379 U.S. 497, 515 (1965).

[3] "Legislators cannot contract away their continuing duty to safeguard public health, safety, morals and welfare." *Veix v. Sixth Ward Building and Loan Association*, 310 U.S. 32, 38 (1940).

later it enacted a statute making lotteries unlawful. The statute was upheld against a contract clause attack on the grounds that the contractual franchise was subject to the state's authority to suppress gambling, the protection of public morality being well within the police power of the state.

By contrast, a state contract involving only a financial obligation does not contract away the police power of the State. In *U.S. Trust*, the Supreme Court rejected the state's argument that the repealing statute was a valid exercise of the state's police powers, finding a transportation bond issue contract purely financial and as such, not a "compromise of the State's reserved powers." *U.S. Trust*, 431 U.S. at 25.

By themselves, therefore, financial obligations of the state do not involve the reserve police powers implied in every state contract. It is only when these financial obligations are contractually coupled with compelling governmental interests that the reserve powers of the State are viable limitations to contractual duties. Pursuant to a contract the state in *Stone* was actively involved in gambling, in *Burning Tree*, sex discrimination. Under *Stone* analysis, suppressing sex discrimination is akin to suppressing gambling, well within the police power of the State, and as such an implied condition to the contract and a legitimate expectation of the parties. Financial motive cannot be attributed to the State as in *U.S. Trust*. As Justice Holmes stated in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908), "One whose rights such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the matter."

Another factor in assessing the legitimate expectations of the contracting parties (and thereby the extent of contractual impairment) is whether the area or industry

has been regulated in the past. *Energy Reserves*, 459 U.S. 400 at 413-14. In *Energy Reserves*, the Supreme Court held that a Kansas statute did not substantially impair the ERG-KPL contract because the natural gas industry was subject to both state and federal price regulations. Therefore, a change in these regulations could not have impaired ERG's reasonable expectations under the contract. The Court stated, "When he purchased into an enterprise already regulated in the 'particular' to which he now objects, he purchased subject to further legislation upon the same topic." *Id.* at 411, citing *Veix v. Sixth Ward Bldg. and Loan Assn.*, 310 U.S. 32, 38 (1940).

In *Burning Tree*, private clubs, country clubs and golf clubs are obviously not a highly-regulated industry akin to the natural gas industry. Looking at the "industry" alone, however, misses the point; rather, the subject of the contract is of import. In *Energy Reserves*, the subject of the contract was natural gas prices, the "particular" which was regulated, and thereby part of the "reasonable expectation." In *Burning Tree*, the subject of the contract is tax benefits, certainly a highly regulated "particular". This point is clarified by a careful reading of *Maryland State Teachers Association v. Hughes*, 594 F. Supp. 1353 (1984) (D. Md.) (*MSTA v. Hughes*). In *MSTA*, a class of public school teachers and other state employees brought suit alleging that the 1984 "Pension Reform Act" violated the Contract Clause by impairing their pension contract with the State. The Court held that purported contract rights had not been impaired, and alternatively, to the extent any contractual interests had been impaired, the Act was reasonable and necessary to serve an important public purpose.

The *MSTA* Court applied the *Energy Reserves* test, addressing legitimate expectations of the parties as directly related to whether an area had been regulated in the past. The Court discussed the highly regulated area

of state pension plans (the subject of the contract), not regulation of teachers and education ("industry") in general. In other words, it was the subject of the contract, not the party ("industry") which was important in terms of regulation.

Often, as in *Energy Reserves*, the "subject" is inextricably interwoven with the party; other times, as in *Burning Tree* and *MSTA*, it is but a "minor particular" of a whole, but in the words of *Energy Reserves*, still the "particular" that has been regulated. Following the *Energy Reserves* and *MSTA* reasoning, there has not been a substantial impairment of the state contract with Burning Tree as Burning Tree should reasonably expect new regulation in the highly regulated "particular", taxation. Indeed, country clubs, in general, and Burning Tree, in particular, have been regulated in this regard for 22 years pursuant to former Article 81, now Tax-Property Article § 8-212 - § 8-218, the regulation in question in this case.

The third factor to be considered in assessing legitimate expectations is the retrospective or prospective effect of the statute. A prerequisite to the applicability of the Contract Clause is that the challenged law operates with a retrospective effect.

It is clear that Chapter 334 is prospective in effect. Burning Tree does not retrospectively lose the tax benefits it has received to date; rather, as of the effective date of the 1986 statute, Burning Tree must choose whether to prospectively cease sex discrimination or lose further tax benefits. *MSTA v. Hughes* is instructional on this point. In *MSTA* it was within the teachers' power to protect all of the pension benefits earned under the old retirement system up to the effective date of the Pension Reform Act of 1984 by choosing an option in a "menu plan". Employees were only required to prospectively increase their contribution rates for future unearned benefits. The court stated that, "In this most

important sense, therefore, the 1984 Act as contrasted with the effect of invalid statutes in *U.S. Trust* and *Allied Steel* do not retroactively deprive the plaintiff class of benefits or rights for which they bargained. . . . In *U.S. Trust*, the security provided to the bond holders when they purchased their bonds years before was 'outright repeal[ed]' . . . The affected parties had no way to protect the benefits of their bargain which had accrued when they bought their bonds." *U.S. Trust*, 431 U.S. at 1363-64. Similarly, in *Allied Steel*, the statute required certain employers to change the contractual time period for pensions to vest and to make retroactive payments to the pension fund to make the fund actuarially sound.

Burning Tree is in an even better position than the teachers in *MSTA*. The teachers had a choice only as to saving certain past benefits contractually promised by state statute; all future benefits were changed without choice. By contrast, Burning Tree has postively no potential loss of past benefits as in *MSTA*. The teachers faced unequivocable loss in all future pension benefits due to statutory change; Burning Tree may or may not lose future tax benefits, determined solely on whether they choose to end sexually discriminatory practices.

For the foregoing reasons, this court concludes that the contract rights of Burning Tree have not been substantially impaired by Chapter 334.

In the alternative, even if substantial impairment of contract were present in this case, Chapter 334 is valid as it satisfies the second and third parts of the *Energy Reserves* test: Maryland has a vital interest in suppressing sex discrimination and has chosen reasonable and appropriate means to accomplish that objective.

A legitimate public purpose capable of justifying a substantial impairment of contract would be to remedy a "broad and general social or economic problem", *Energy Reserves*, 459 U.S. at 412. In light of history and recent

events, sex discrimination, as all discrimination, is a broad and general social problem. By passing the ERA, Maryland has taken an affirmative stand on the repugnance of sexually discriminatory practices, over and above reliance on the equal protection clauses of the United States and Maryland Constitutions.

In ascertaining whether the statute is reasonable and necessary to the public purpose asserted in support of the regulation, the Supreme Court in *Energy Reserves* integrated the public private contract distinction set forth in *U.S. Trust*, 431 U.S. at 26. Where a state's own contract is involved, complete deference to the legislative assessment of reasonableness and necessity is not appropriate because the state is a party of interest. *Energy Reserves*, 459 U.S. at 412-413. In other words, stricter scrutiny applies to state contracts in this regard.

Reasonableness is to be judged in light of whether prior state contractual obligations "had effects that were unforseen and unintended by the legislature" when the contracts creating those obligations and rights were created. *U.S. Trust*, 431 U.S. at 31. In *U.S. Trust*, the Court held that New Jersey should have forseen mass transit problems at the time the bonds were issued. In *MSTA*, however, the insurance crisis was not deemed forseeable. Burning Tree argues that the state should have been on notice of activity in the area of equal rights. Although the ERA was viable as of 1972, the primary purpose exception was facially gender-neutral and was, therefore, seen as compatible with the ERA at the time the Burning Tree contract was entered into. It was not until 1985 in *Burning Tree v. Bainum* that the primary purpose exception was struck down as having a discriminatory effect.

Necessity is to be judged on two levels: 1) Whether a less drastic modification could have been implemented and 2) whether, even without modification, the State could have achieved its stated goals. *Id.* at 29-30.

The Burning Tree case diverges from other Contract Clause cases at this point. The other state contract cases generally involved financial difficulties on the part of the State which led to legislation and subsequent impairment of contract, sometimes justified. (In *U.S. Trust*, the State was not in truth acting as a sovereignty, but reduced to the level of an ordinary individual seeking to borrow money and contracting to repay it with interest, *Id.*, at 25 n. 23; *MSTA*, insurance crisis reflecting on state pension monies; *Chevy Chase Savings and Loan v. State*, 306 Md. 384 (1986), financial panic of savings and loan crisis).

In *Burning Tree v. Bainum*, the State of Maryland is not acting pursuant to financial motives to regain tax monies by cancelling open space preferential tax benefits. The $300,000.00 in taxes is not expected to eliminate or alleviate any state financial problems. Rather, the State is acting to eliminate discrimination pursuant to the ERA. The presence of financial obligations is not an absolute bar to subsequent modification of a state's financial obligations. Rather, it "may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust*, 431 U.S. at 25. In Burning Tree, the State is affirmaitvely involved in discriminatory measures pursuant to the contract in question. It would be impossible for the State to achieve its anti-discrimination goal without the elimination of this discriminatory loophole.

For all these reasons, Chapter 334 does not violate the Contract Clause of the United States Constitution.

III. *Chapter 334 Is Not Unconstitutional As A Special Law*

Article III, § 33 of the Maryland Constitution states, "The General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." The Plaintiff argues, in Count 5,

that Chapter 334 constitutes a special law; thus, it violates Article III, § 33 of the Maryland Constitution.

"A special law is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Prince George's County v. B. & O. R. Co.*, 113 Md. 179, 183 (1910). But as the Court of Appeals noted in *Cities Service Co. v. Governor*, 290 Md. 553 (1981):

> "This definition * * * provides no mechanical rule for deciding cases, as it depends upon a determination of what constitutes the class. *Id.*, at 567.
>
> * * * *
>
> Consequently, in applying § 33 to determine whether an enactment affects less than an entire class and is, therefore, a 'special law', this Court has looked to the purpose of the constitutional prohibition." *Id.*, at 568.

The Court then noted that one of the primary functions of § 33 is to prohibit a single individual from benefiting, or being harmed, by any legislation. If a law does this, then it is an unconstitutional special law. *Id.* at 569-70. Specifically, the Court stated:

> If a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation, this would support a conclusion that the Act constitutes a prohibited special law (citations omitted). The public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest, are pertinent considerations (citations omitted). Finally, in deciding whether an enactment applies to an entire class, or applies only to certain members of the class and therefore is prohibited by § 33, the Court has reviewed the legislatively drawn distinctions to deter-

mine whether they are arbitrary and without any reasonable basis. (Citation omitted). *Id.*, at 570.

Chapter 334 does not apply to a particular individual or business. The Legislature passed a bill which prohibited a class of country clubs, i.e., single sex clubs, from receiving a tax deferment from the State. While it is true Burning Tree may be the only club to fall within the class, it (the class) is still a legitimate one. Burning Tree can remove itself from the class by admitting women and the law would still be applicable to any future single sex clubs. The law does not want any country club, now, and in the future, to receive a tax break while simultaneously practicing sexual discrimination.

There are no grounds to view the law as arbitrary or capricious. The General Assembly, by enacting Chapter 334, was responding to the *Burning Tree v. Bainum* decision. It chose to respond by enacting a prohibition against all clubs whose primary purpose was to discriminate on the basis of sex. Such an enactment is a public law and not a special law. Just because only one club in the state was affected does not automatically make Chapter 334 a special law. *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 379 (1972).

For the reasons outlined above, the Court holds that Chapter 334, Laws of Maryland 1986, is not unconstitutional as a law under Article III § 33 of the Maryland Constitution.

IV. *Burning Tree Is A Private Organization But Its First Amendment Rights Have Not Been Violated By The State*

Plaintiff, in its Amended Complaint, added Count 6. Burning Tree believes that the denial of its tax deferment violates the associational rights of Burning Tree's members under the First Amendment to the United States Constitution.

There is no doubt that the right to association exists under the First Amendment. *See, Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The problem for the courts is that the right to association does not extend to all forms of human relationships. The Supreme Court has set forth certain criteria to determine what relationships fall under the protection of the First Amendment:

> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent. *Id.* at 620.

This Court must now apply these criteria to Burning Tree itself. This is necessary to determine "whether the 'zone of privacy' established by the First Amendment extends to a particular club or entity." *Board of Directors of Rotary International v. Rotary Club*, No. 86-421, slip op. at 9 n.6 (U.S. May 4, 1987).

Based on the second affidavit of Stephen Clarkson (See Attachment A to Motion of Plaintiff for Summary Judgment on Count Six of the Amended Complaint) the facts show that Burning Tree is a very selective group. The club currently consists of 250 resident members and 190 non-resident members. A non-resident member must reside more than 75 miles from the club. Non-resident members are not allowed to participate in the making of decisions concerning the operation of the club. This includes any membership deci-

sions. The membership policy of the club has remained the same since its founding. A person cannot actually apply to join; but, rather, he must be proposed for membership by a member and then seconded by another. The members who propose and second an applicant must submit the following information to the Board: the number of years the candidate has lived in the Washington area; the social clubs that the candidate belongs to; and the number of years the proposer and seconder have known the candidate along with the names of other club members who know the candidate. It is also a common practice for the proposer to host an informal cocktail party to allow members to meet the candidate. No applicant is accepted as a member unless the Board approves him and its proceedings are confidential and final. As a result of this selection process, the club admits 10 to 15 new resident members a year.

The club may be used by members and their guests. A guest can only use the facilities when their sponsor is personally with them. Any guest living in the Washington Metropolitan area may only be invited twice a month.

The purpose of the club is to play golf. It is the policy of the club not to condone the discussion of any business matters. The club does not rent out its facilities for any social events.

Since the evidence shows that the purpose of Burning Tree is to play golf, Chapter 334 does not burden the club's freedom of expressive association. The statute might, however, affect the club member's freedom of intimate association. *Roberts v. United States Jaycees*, 468 U.S. at 618. It was under this analysis of freedom of intimate association that the Supreme Court in *Roberts* listed the criteria of size purpose, policies, selectivity and congeniality.

These facts as outlined above clearly distinguish Burning Tree from such organizations as the Jaycees or the Rotary Club. As the Supreme Court noted in *Rotary Club*: "Determining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* at 7.

In examining these criteria, the Court concludes that the size of Burning Tree is much smaller than clubs like the Jaycees or the Rotary Club. In fact, the two local chapters involved in the *Roberts* suit numbered 830 persons and Burning Tree is less than half that size if only resident members are included. Perhaps more importantly is the fact that there is a limited membership policy. The club may have only 250 resident and 250 non-resident members at any one time. (See Second Clarkson Affidavit ¶ 10). In the *Rotary Club* decision the Supreme Court noted that the local Rotary Clubs had no numerical limit on membership.

Another criteria which the Court finds important is selectivity. As was outlined above, the selection of new members is a long and difficult process. A person is by no means assured of acceptance once he is being considered. An extensive look into a person's background is done by the club. Once again, this contrasts sharply with the facts presented to the Supreme Court in the *Roberts* case. The Jaycees had virtually no criteria in selecting members:

> Apart from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds. In fact, a local officer testified that he could recall no instance

> in which an applicant had been denied membership on any basis other than age or sex. *Roberts v. United States Jaycees*, 468 U.S. at 621.

While it is difficult to determine exactly where, on a continuum from the most "intimate to the most attenuated of personal attachments" a particular group lies, this Court is convinced that Burning Tree is a private club that is entitled to protection of its First Amendment right to freedom of intimate association.

Burning Tree argues that the State cannot deny benefits to a party, if that party exercises a constitutionally protected right. This principle was set forth by the Supreme Court:

> For at least a quarter-centry, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'product a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (citation omitted).

This Court accepts this proposition; but, it does not apply to the facts of this case. The Court believes this case is more like the situation in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). In *Regan* the appellee, Taxation With Representation (TWR), was denied tax-exempt status under the Internal Revenue Code.

The basis for the denial was that a large part of TWR's activities consist of lobbying Congress on specific legislation. TWR brought suit and argued the congressional prohibition against lobbying violated its First Amendment rights. TWR supported its argument with the same cases that Burning Tree now uses in its brief. *See, Speiser v. Randall*, 357 U.S. 513 (1958); *Perry v. Sinderman*, *supra*. Judge Rehnquist, writing for the Court, rejected TWR's argument:

> TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. But TWR is just as certainly incorrect when it claims that this case fits the Speiser-Perry model. The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.
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> This aspect of these cases is controlled by *Cammarano v. United States*, 358 U.S. 498, 3 L.Ed. 2d 462, 79 S. Ct. 524 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. In these cases, as in *Cammarano*, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWA's lobbying. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan*, 461 U.S. at 545-546 (citations omitted).

Under Chapter 334 the State has chosen not to subsidize those country clubs which discriminate on the basis of race, color, creed, sex or national origin. The State is in no way interfering with the club members' rights of association. Burning Tree wants to receive a tax benefit that it admits the State has no obligation to give. The State, however, is not required to subsidize single sex country clubs. Burning Tree has chosen to exercise its constitutional right of association by not associating with women. The State does not now have to bestow a benefit upon Burning Tree merely because it exercised its constitutional right. Therefore, the Court holds that Burning Tree maintains its constitutional right to association under the First Amendment; but the State does not have to pay for it.

V. *Section 8-214(b) Of The Tax-Property Article Violates The Equal Rights Amendment And Is Not Severable From The Prohibition Of Sex Discrimination In Section 8-214(a)*

As noted earlier, it is ironic that Burning Tree, which argued before the Court of Appeals that single-sex country clubs do not violate the E.R.A., is now arguing before this Court that the periodic discrimination exception does violate the E.R.A.[4] This is an issue the State concedes is difficult to answer. (See Attachment C to Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Judgment).

The State moves that this section of the complaint, Count 4, be dismissed due to a lack of standing. The first argument made by the State is that no one who has been harmed by the periodic discrimination is a party to this suit. For this reason, and because the Plaintiff is an inappropriate representative to assert the rights of these

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[4] Md. Decl. of Rights Art. 46 declares: "Equality of rights under the law shall not be abridged or denied because of sex."

third parties, this part of the complaint should be dismissed.

In response to this argument, Burning Tree filed a Second Amended Complaint which names two individuals as parties to the suit, along with Burning Tree. Consequently, the State filed a Motion To Strike the two individuals from the suit.

The State's argument in support of striking the newly named individuals is simple. Rule 2-341(c) permits a plaintiff to add a party to a proceeding, even to correct nonjoinder of a party, but only "so long as one of the original plaintiffs and one of the original defendants remain as parties to the action." Rule 2-341(c)(5). Because Burning Tree lacks standing, according to the State, one of the original plaintiffs would not remain as a party to the action; (at least for the E.R.A. claim) and under Rule 2-341(c)(5) no amendment should be allowed. However, because this Court is going to hold that Burning Tree does have standing, this argument falls.[5] Therefore, the Motion to Strike the additional parties is denied.

Returning to the question of Burning Tree's standing, the Court finds the Plaintiff does have standing. Burning Tree currently receives a tax deferment that, according to the Plaintiff, amounts to a tax saving of $300,000.00 for the 1986-87 tax year. There is no doubt that Burning Tree, Inc. is a taxpayer. The evidence shows that from 1981-85 the Plaintiff paid $165,000.00 in property taxes to both the State and Montgomery County. (See Clarkson Affidavit Attached to Memorandum of Plaintiff in Opposition to Defendant's Motion for Summary Judgment and In Support of Plaintiff's

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[5] The State also argues that the named individuals lack standing as taxpayers to raise an E.R.A. claim. The Court declines to rule on this issue since it has determined that the club has standing to pursue an E.R.A. claim.

Motion for Summary Judgment). Relying on this fact, Burning Tree argues that it has valid standing as a taxpayer. This Court agrees.

The Court of Appeals has ruled that all a taxpayer needs to establish standing is to show, ". . . that the action being challenged results in a pecuniary loss or an increase in taxes." *Citizens Planning and Housing Association v. County Executive of Baltimore County*, 273 Md. 333, 339 (1974). If Section 8-214(b) is upheld as constitutional, it is unchallenged that Burning Tree will suffer an increase in its taxes. In *Citizens Planning* the Court reviewed the law on taxpayer standing and stated what a taxpayer has to show to establish standing:

> "From this decision [*Baltimore v. Gill*, 31 Md. 375 (1869)] and the long line of Maryland cases has become established that a taxpayer may invoke the aid of a court of equity to restrain the action of a public official or an administrative agency when such action is illegal or *ultra vires*, and may injuriously affect the taxpayer's rights and property. [Citations omitted]. The corollary to this rule is that the taxpayer will be allowed such relief only when some special damage is alleged and proved, or a special interest is shown which is distinct from that of the general public. [Citations omitted]. This has been interpreted to require a showing that the action being challenged results in a pecuniary loss or an increase in taxes." *Citizens Planning*, 273 Md. at 339. *See Carrol Park Manor Community Association, Inc. v. Board of County Commissioners of Frederick County, Maryland*, 50 Md. App. 319 (1981).

Under the law, as explained in *Citizens Planning*, Burning Tree has established standing to challenge the constitutionality of Section 8-214(b).

The State also contends that the club has no standing to invoke the E.R.A., because the E.R.A. creates a purely personal constitutional right that is not available to a corporation. The problem with this argument is that it fails to recognize that Burning Tree is asserting its own rights, as a taxpayer, not to be subject to increased taxation because of an unconstitutional statute. It does not matter to Burning Tree what part of the Constitution the law is in conflict with. The critical question is, does Section 8-214(b) of the Tax-Property Article violate the Maryland Constitution. Burning Tree, as a taxpayer who will suffer an increase in taxes if the answer is no, has standing to assert a claim.[6] The Court must now turn its attention to the principal issue of the complaint. Burning Tree argues that the periodic discrimination exception, based on *Burning Tree v. Bainum*, *supra*, violates the E.R.A. Specifically, Section 8-214(b) states:

> (b) *Exception*—If the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section.

The Court concludes that this provision of the law discriminates on the basis of sex; therefore, it is unconstitutional under Maryland's E.R.A.

Both the Plaintiff and the Defendant rely on the *Burning Tree v. Bainum* decision to support its position in this area. The Plaintiff relies upon the opinions of

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[6] An additional argument made by the State is that Burning Tree is challenging the wrong law. The State claims the primary provision, which originally was enacted by Chapter 870, Laws of 1974, was not struck down by the *Burning Tree v. Bainum* decision. Therefore, Chapter 334, Laws of 1986, did not add anything new to the law. This is in error. Chief Justice Murphy, in announcing the judgment of the Court, struck down the entire prohibition against sex discrimination and this included the periodic discrimination provision. *Burning Tree v. Bainum*, 305 Md. at 81-84.

Judge Eldridge and Judge Rodowsky to bolster its argument. The State adopts the reasoning of Judge Murphy in its behalf. After a careful review of the *Burning Tree v. Bainum* decision this Court does not believe the decision definitively resolves the question. In point of fact, Judge Eldridge's opinion specifically refrained from determining the constitutionality of the periodic discrimination. *Burning Tree v. Bainum*, 305 Md. at 90 n. 1.

Before addressing the constitutional issue it must first be determined if there has been state action. It is accepted that before the statute can be declared unconstitutional, there must be some government action or someone acting under governmental authority.

In determining whether the primary purpose exception constituted state action, Judges Eldridge and Rowdowsky concluded it did; albeit for different reasons. While recognizing that Judge Murphy ruled differently on this question, the Court believes it is bound by the majority decision on this issue. It does not matter whether you adopt Judge Rodowsky's reasoning or Judge Eldridge's; the result is the same. Judge Rodowsky determined that the primary purpose exception was state action because the exception was a statute. *Id.* at 86-88. Judge Eldridge reasoned that the primary purpose exception was state action because the law affirmatively sanctioned purely private discrimination. *Id.* at 94. The periodic discrimination exception qualifies as state action under either approach. The exception is a statute; therefore, under Judge Rodowsky's analysis, you have state action. The periodic discrimination provision does affirmatively sanction the exclusion of one sex on specific days or at specific times. Adopting Judge Eldridge's reasoning, then, requires this Court to conclude that Chapter 334 is state action.

Having determined that Chapter 334 does involve state action, the issue now is whether the periodic discrimina-

tion exception is "an abridgement of equality of rights because of sex." *Id.* at 90. In resolving this issue, the Court is aware that it must adopt an absolute standard of review of the law in determining its constitutionality under the E.R.A. *See Rand v. Rand*, 280 Md. 508 (1977).

In *Rand*, the Court of Appeals reviewed how other states interpreted their equal rights amendments. It concluded that, "The tests employed under constitutional provisions dealing with equality of rights range from absolute to permissive." *Id.* at 515. The Court went on to accept the position of the Supreme Court of Washington, which stated in *Darrin v. Gould*, 85 Wash. 2d. 859 (1972) that by passage of its E.R.A. the people "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests." 85 Wash. 2d at 871. Cited in *Rand v. Rand*, 280 Md. at 512. Relying in part on decisions from Washington and Pennsylvania, the Court of Appeals held:

> We believe that the broad, sweeping, mandatory language of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the ERA in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications. *Rand v. Rand, supra*, at 515-516.

This drastic alteration of the traditional views of the validity of sex-based classifications is a continuing process.

In *Kline v. Ansell*, 287 Md. 585 (1980), the Court of Appeals had to determine if the common law cause of action for criminal conversation was permitted under Art. 46 of the Maryland Declaration of Rights. In ruling that criminal conversation was unconstitutional under the

E.R.A., the court relied on its decision in *Rand*. The Court held:

> A man has a cause of action for criminal conversation, but a woman does not. Moreover, a man who engages in an act of sexual intercourse with another man's wife is civilly liable for damages, but a woman who engages in a similar activity with another woman's husband is not. Thus, Maryland's law provides different benefits for and imposes different burdens upon its citizens based solely upon their sex. Such a result violates the ERA. Any previous implicit approval by this Court of the action for criminal conversation is eradicated by the existence of the ERA. The common law cause of action for criminal conversation is a vestige of the past. It cannot be reconciled with our commitment to equality of the sexes.

In *Condore v. Prince George's County*, 289 Md. 516 (1981), the Court had to reconcile the E.R.A. with the common law doctrine of necessaries. After an exhaustive review of the case law the Court held:

> "[W]e think the common law doctrine of necessaries is predicated upon a sex-based classification which is unconstitutional under the E.R.A." *Id.* at 530.

In *Turner v. State*, 299 Md. 565 (1985) the issue was the constitutionality of the female sitters law. The Court reaffirmed *Rand* and its progeny by declaring:

> This Court has consistently held that a law that imposes different benefits and different burdens upon persons based solely upon their sex violates the Maryland E.R.A. *Id.* at 574.
>
> * * * *
>
> [T]he Female Sitters Law provides different benefits to and imposes different burdens upon men and women. Under the statute, a man can be employed as a sitter but a woman cannot. Moreover, an em-

> ployer may employ male sitters but may not employ female sitters. Thus, Maryland's law provides different benefits to and imposes different burdens upon its citizens based solely upon sex. Such a result violates the Maryland ERA. The Female Sitters Law is a vestige of the past. It cannot be reconciled with our commitment to equality of the sexes. Accordingly, we now hold that the Female Sitters Law is unconstitutional. *Id.* at 575-576.

Then, in *Burning Tree v. Bainum*, the Court had to determine if the primary purpose provision violated the E.R.A. Chief Judge Murphy found that there was no violation of the E.R.A. because there was no state action. However, Judge Murphy did reaffirm that all persons have equal rights under the law, regardless of their sex.

> "It is thus clear that the E.R.A. flatly prohibits gender based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, rights and responsibilities as between men and women." *Burning Tree v. Bainum*, 305 Md. at 64.

In fact, the only acceptable reason for treating the sexes differently, under the E.R.A., is for physical reasons peculiar to one sex. *Id.* at 64 n. 3.

It is under this absolute standard of review that this Court must determine if Chapter 334 violates Maryland's E.R.A. Section 8-214(a) prohibits any country club to discriminate on the basis of race, color, creed, sex or national origin and still be allowed to enter an agreement to reduce its taxes under this subtitle. But there is an exception to this blanket prohibition, and that is the periodic discrimination provision. Section 8-214(b) allows a country club to "exclude certain sexes on specific days or at specific times on the basis of sex."

The language of the periodic discrimination provision is clear. A club may prohibit a man or woman from

using the club and the only reason for such a denial is one's sex. Under Maryland's E.R.A. and the case law derived from it, this is unconstitutional.

The Court is aware that members of one sex may want to get together for their own purposes, and this is entirely permissible; but when a country club seeks to receive a substantial state benefit, it must abide by the law. The law in Maryland is explicit. Sex-based classifications are not valid under the E.R.A. As Chief Judge Murphy stated in *Rand*, the E.R.A. did drastically alter our traditional views of sex-based classifications.

This Court has not applied a strict scrutiny analysis in determining the constitutionality of § 8-214(b). This is because the Court believes *Rand* and its progeny require an even higher standard, as explained previously. However, the Court is aware that Judge Eldridge, writing for Judges Cole and Bloom, in *Burning Tree v. Bainum*, did apply a strict scrutiny analysis in determining the primary purpose exception was unconstitutional under the E.R.A. This Court does not believe Judge Eldridge's opinion overturned *Rand*; therefore, it did not apply a strict scrutiny analysis in its determination of the constitutionality of Chapter 334.

But if this Court is incorrect in its reading of *Rand* and a strict scrutiny analysis is the appropriate standard of review, the opinion of the Court would not change.

Since this Court has determined that the periodic discrimination provision, like the primary purpose provision, discriminates on the basis of sex, it is the State's obligation to persuade this Court that the sex-based classification is justified.[7] As in *Burning Tree v. Bainum*, the

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[7] The only difference to this Court between the primary purpose exception and the periodic discrimination exception is one of degree. The former permits discrimination to exist every day. The latter allows discrimination not every day but on some days, to be determined by the country club.

State has not put forth any reason to justify the sexual discrimination permitted by Chapter 334.

This Court is cognizant of the second class status that women have held in our society over the years. This is a status that was written into our laws as well. The sexual discrimination women have suffered was summarized by the U.S. Supreme Court:

> "[O]ur statute books gradually became laden with gross, stereo-typed distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal, An American Dilemma 1073 (20th anniversary ed 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right, which is itself "preservative of other basic civil and political rights"—unitl adoption of the Nineteenth Amendment half a century later.
>
> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena. See generally K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Frontiero v. Richardson, 411 U.S. 677, 685-686 (1973). The Court believes that the periodic discrimination provision is a more subtle form of discrimination. In Section 8-214(a) the General Assembly declared that no country club, who received a reduction in its taxes, can discriminate on the basis of race, color, creed, sex, or national origin. Then in § 8-214(c) the General Assembly allows a club to sexually discriminate on a part time basis. This provision may be more subtle than the primary purpose provision but it still amounts to discrimination on the basis of sex. Judge Rodowsky did comment on the periodic discrimination provision. It was his conclusion in *dicta* that the periodic discrimination provision does discriminate on the basis of sex: "Under Ch. 870 a member of a participating, mixed membership country club who, solely on the basis of sex, is discriminated against on certain days and at certain times, has no benefits." *Burning Tree v. Bainum*, 305 Md. at 87. Since the State has failed to even attempt to justify this denial of benefits, the statute must be declared unconstitutional under a strict scrutiny analysis.

The Court is now faced with the same problem that the Court of Appeals had in *Burning Tree v. Bainum*, i.e., is § 8-214(b) severable from the rest of the statute? The Court believes it is bound by Chief Judge Murphy's opinion with respect to this matter. The severability issue has been addressed by the Court of Appeals prior to *Burning Tree v. Bainum* and the law was explained in *Turner v. State*, 299 Md. 565 (1984).

> The primary focus in questions of severability is legislative intent. The intent to be ascertained, however, is not actual legislative intent, as the Legislature obviously intended to enact the statute as written in its entirety. Rather, when severability is the issue, the courts must look to what would have been the intent of the legislative body, if it had known that the statute could be only partially effective. In determining this legislative intent, in addition to

> considering the legislative history of an act, courts apply certain established principles of construction. Perhaps the most important of these principles is the presumption, even in the absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible. Moreover, when the dominant purpose of an enactment may largely be carried out, notwithstanding the statute's partial invalidity, courts will generally hold the valid portions severable and enforce them. Nevertheless, when the General Assembly enacts a prohibition with an excepted class that is subsequently found to be constitutionally infirm, ordinarily it will not be presumed that the General Assembly would have enacted the prohibition without the exception. Such a presumption would extend the prohibition to a class of persons whom the General Assembly clearly intended should not be reached. *Id.* at 576-577.

This principle of law was reaffirmed by Judge Murphy when he wrote, "This Court has said that if the dominant purpose of the Statute may be carried out, it will sever the invalid portion." *Burning Tree v. Bainum*, 305 Md. at 83. The Court concludes that the presumption in favor of severability does not apply in this instance. Just as in *Burning Tree v. Bainum*, the clause in question is an exception to a prohibition. If the Court severed the periodic discrimination exception, the prohibition would apply to the many country clubs who practice such policies. The Court must determine if this was the intent of the General Assembly.

Chapter 334 was introduced into the Senate as S.B. 483. When first introduced, S.B. 483 did not contain the periodic discrimination provision. Section 8-214(b) was amended to the bill during the legislative process. The amendment reintroduced the periodic discrimination exception to S.B. 483. This provision attempts to limit the scope of § 8-214(a). Judge Murphy commented on this

very fact, stating, "To make the ostensible prohibition against sex discrimination even more ineffective, a country club which has members of both sexes may discriminate, solely on the basis of sex, 'on certain days and at certain times.' " *Id.* at 83.

The Court admits that the periodic discrimination provision, unlike the primary purpose exception, does not render the prohibition toothless. But periodic discrimination does greatly reduce the effectiveness of the prohibition. To allow section 8-214(e) to stand without the limiting language of the periodic discrimination exception would go against the intent of the Legislature. Because if the General Assembly intended totally to ban sex discrimination, it would not have amended S.B. 483. Therefore, the unconstitutional periodic discrimination provision is not severable from the prohibition against sex discrimination so the entirety of Section 8-214 must fall.

For the reasons stated above, it is this 21st day of July, 1987,

ORDERED, that Counts I, II, III, V and VI of the Second Amended Complaint are denied; and it is further

ORDERED, that on Count IV, judgment is hereby entered in favor of the Plaintiff, and it is further

ORDERED, that the periodic discrimination provision of § 8-214(b), Maryland Tax-Property Article, violates Article 46 of the Maryland Declaration of Rights and is unconstitutional; and it is further

ORDERED, that the costs of these proceedings shall be equally divided between the parties hereto.

/s/ Martin A. Wolff
MARTIN A. WOLFF
Judge

Copies to:

Benjamin R. Civiletti, Esquire
Robert A. Zarnoch, Esquire

TAX-PROPERTY ARTICLE OF THE MARYLAND CODE

§ 8-213. Same—Agreements.

(a) *"Agreement" defined.*—In this section, "agreement" means an agreement made under subsection (b) of this section.

(b) *Uniform agreements.*—The Department may make agreements with country clubs that specify the manner of assessing the land of a country club. All agreements shall contain uniform provisions.

(c) *How valued.*—(1) Except as provided in paragraph (2) of this subsection, the land of a country club that is actively used as a country club that meets the requirements of § 8-212 of this subtitle shall be valued on the basis of that use under § 8-104 of this title and may not be valued on the basis of any other use.

(2) If the land of a country club that meets the requirements of § 8-212 of this subtitle has a greater value than its value when used as a country club, the land shall also be assessed on the basis of the greater value.

(3) Except as provided under § 8-216 of this subtitle, the property tax payable by a country club under this section is based on the assessment of the land under paragraph (1) of this subsection.

(4) If an assessment is made on the greater value under paragraph (2) of this subsection, the assessment records for the country club shall record the assessment under paragraphs (1) and (2) of this subsection.

(5) The valuation of the land of a country club is subject to an agreement under this section is adjusted as provided by § 8-103(d)(2) of this title. Any assessment of the land of a country club under this section is effective on the date of finality next following the date of an agreement.

(d) *Duration and extension of agreements.*—(1) An agreement shall be for at least 10 consecutive years or for a longer period at the option of the country club.

(2) An agreement may be extended, but only in increments of at least 5 years. (An. Code 1957, art. 81, § 19; 1985; ch. 8, § 2; 1986, chs. 171, 334.)

§ 8-214. Same—Discrimination.

(a) *In general.*—Except as provided in subsection (b) of this section, if a country club that meets the qualifications of § 8-212 of this subtitle allows or practices discrimination based on race, color, creed, sex, or national origin in granting membership or guest privileges, the country club may not make an agreement under this subtitle.

(b) *Exception.*—If the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section. (An. Code 1957, art. 81, § 19; 1985, ch. 8, § 2; 1986, ch. 334.)

§ 8-215. Same—Determination of discrimination and consent agreements.

(a) *Determination by Attorney General.*—After holding a hearing for a country club, the Attorney General shall determine if the country club practices discrimination.

(b) *Hearing and consent agreement.*—If the Attorney General finds evidence of a pattern of discrimination, the Attorney General shall make a consent agreement with the country club to end the discrimination.

(c) *Order where discrimination found.*—If a country club refuses to make a consent agreement, or breaches or violates a consent agreement, the Attorney General shall issue an order to the country club to end the discrimination.

(d) *Assessing on failure to comply.*—(1) If a country club fails to comply with an order issued under subsection (c) of this section, the country club may not be assessed as a country club under § 8-213 of this subtitle until the Attorney General determines that the country club complies with the order.

(2) A country club that has failed to comply with an order issued under subsection (c) of this section shall be assessed as if there were no agreement under § 8-213 of this subtitle. However, the country club is not liable for the unpaid taxes described in § 8-216 of this subtitle.

(e) *Appeal.*—A country club may appeal any action taken under this section as provided by §§ 10-215 and 10-216 of the State Government Article.

(f) *Subpoenas.*—(1) If a country club fails to provide information requested by the Attorney General to determine a charge of discrimination, the Attorney General may request that the circuit court for the county in which the country club is located issue a subpoena for the information.

(2) If the circuit court finds that the information sought relates to proof of discrimination by a country club, the court shall issue a subpoena for the information. (An. Code 1957, art. 81, § 19; 1985, ch. 8, § 2.)

§ 8-216. Same—Property taxes.

(a) *Taxes on property.*—(1) Except as provided in § 8-217 of this subtitle, a property tax is due, for the amount of the difference, if any, between the assessment of the land under § 8-213(c)(1) and (2) of this subtitle, when before the end of an agreement made under § 8-213 of this subtitle any land subject to the agreement:

(i) is conveyed to a new owner;

(ii) ceases to be used as a country club; or

(iii) fails to meet the qualifications for a country club under this title.

(2) The property tax shall be calculated at the tax rate applicable for each taxable year.

(b) *Calculation of taxes.*—(1) Except as provided in paragraph (2) of this subsection, a property tax is due for each taxable year beginning with the first taxable year in which the land was assessed under § 8-213(c)(1) or (2) and ending with the taxable year in which the property tax becomes due under subsection (a) of this section.

(2) The period for which the property tax is due may not exceed 10 years.

(c) *Deferred taxes.*—(1) Except as provided by § 8-217 of this subtitle, if during the 10-year period following the year in which an agreement made under § 8-213 of this subtitle is ended, the land subject to the agreement is conveyed to a new owner, a deferred property tax is due.

(2) The deferred property tax is due for a 10-year period ending with the year in which the land subject to an agreement is conveyed. The amount of the deferred property tax is the difference, if any, between the assessment of the land under § 8-213(c)(1) and (2) of this subtitle.

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

No. 3108902

BURNING TREE CLUB, INC.,
Plaintiff,

v.

STATE OF MARYLAND, *et al.*,
Defendants.

Affidavit of Stephen B. Clarkson and
Attachments to Affidavit 8/4/86

AFFIDAVIT

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss:

STEPHEN B. CLARKSON, being duly sworn, deposes and says:

1. I am a resident of the State of Maryland, living at 7101 Heatherhill Road, Bethesda, Maryland 20817. I am a member of Burning Tree Club, Inc. ("Burning Tree" or the "Club"). I have been a member of Burning Tree since 1974. I am presently also a member of the Board of Governors of the Club. I submit this Affidavit in support of Burning Tree's Opposition to Defendants' Motion to Dismiss and its Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment.

2. Burning Tree was founded as a men's club in 1922. It presently has approximately 250 resident members from the Washington, D.C. metropolitan area, most of whom are residents of Maryland. Burning Tree's membership includes whites, blacks, Christians and Jews, as well as members of various other ethnic and cultural groups. Unlike the usual "country club," Burning Tree is not a "family" club for women and children as well as men. Breakfast and lunch are served at the Club, but regular dinners are not. The bar closes at 7:00 p.m., after which the Club premises are empty. It does not have, and has never had, any women members.

3. Burning Tree is a small, selective club, with rigorous membership criteria, devoted exclusively to the game of golf. There are no tennis courts, swimming pools or other similar facilities at the Club. No dances, weddings, state golf association activities, or similar affairs are conducted at the club. The pursuit of business matters on Club premises is not condoned. Burning Tree's members believe that by their participation in the Club they are exercising rights of association protected by the First Amendment to the United States Constitution.

4. Approximately 60 of Burning Tree's members are retired, many with fixed incomes. It is anticipated by the Club's Board of Governors that an increase in dues of sufficient magnitude to cover the Club's increased taxes, in the event that the State is successful in avoiding honoring its contract with Burning Tree, would cause a substantial loss in the present membership.

5. When, in 1965, the General Assembly of the State of Maryland enacted the statute that affords special tax deferrals to defined "country clubs" upon prescribed terms, Burning Tree entered into ten-year contract with the State pursuant to which the Club committed that its property would be maintained as a golf club and not developed—i.e., that the property would be maintained as

open green space—subject to recapture of deferred taxes in the event of non-compliance and to the other provisions now set forth in *Md. Tax-Property Code Ann.* § 8-212 *et seq.* The contract was extended for another ten-year period in 1975, and in 1981, after the Club's membership and guest policies had been investigated by the Attorney General, a new contract, presently in effect, was entered into for a fifty-year period. Accordingly, the current contract, attached hereto as Exhibit A, presently has forty-five years to run. Burning Tree has consistently complied with its contracts with the State and stands ready to continue to do so.

6. The present market value of Burning Tree's 225-acre property, which is located at River Road and U.S. 495, has been determined by the Maryland tax authorities to be $23,683,400. The land was purchased in 1922 for $311,289. Burning Tree pays property taxes to both the State and Montgomery County. From 1981 through 1985 it paid in excess of $165,000 in such taxes.

7. During the past decade Burning Tree has made substantial expenditures in reliance upon its contracts with the State. In 1978 the Club spent in excess of $200,000 for the construction and installation of a new watering system. In the same year, the Club rebuilt three greens, spending more than $60,000 to do so. The Club has made other substantial outlays during the past five years for the maintenance and improvement of its facilities.

8. I am personally aware of the practices of a number of Maryland country clubs, some of which receive tax deferrals based on contracts entered into with the State of Maryland pursuant to Section 8-212 *et seq.* of the Maryland Code, Tax-Property article. These clubs place restrictions on when women may or may not use club facilities, particularly during certain periods on Saturdays and Sundays. Specifically I am aware that at the clubs listed below such restrictions exist as indi-

cated. The clubs known to me to have open space contracts with the State are marked with an asterisk.

a. **Bethesda Country Club* (Bethesda, Md.)
Women cannot go off first tee on golf course between 12 noon and 2:00 p.m. weekdays. Women cannot play golf before 12:00 noon on Saturdays, Sundays, and holidays. (Women who have membership in their own names are not so restricted.)

b. **Chevy Chase Club* (Chevy Chase, Md.)
Women cannot play golf before 2:00 p.m. on Saturday or before 10:30 a.m. on Sunday.

c. **Columbia Country Club* (Chevy Chase, Md.)
Women cannot play golf until after 2:00 p.m. Saturdays, Sundays, or Mondays.

d. **Congressional Country Club* (Bethesda, Md.)
Women cannot play golf until after 12:30 p.m. on Saturdays, Sundays, holidays or between 11:00 a.m. and 4:00 p.m. during weekdays.

e. *Fountain Head Country Club* (Hagerstown, Md.)
Women cannot play golf until after 11:00 a.m. on Saturdays and Sundays.

f. *Hillendale Country Club* (Phoenix, Md.)
Golf course reserved for men only on Wednesday and Thursdays from 12:00 noon to 1:30 p.m. and before 1:00 p.m. on Saturdays and holidays.

g. **Manor Country Club* (Rockville, Md.)
Women may not use 18-hole golf course until after 12:00 noon on Saturdays, Sundays, holidays or until after 4:00 p.m. on Wednesdays.

h. *Ocean City Golf Club* (Ocean City, Md.)
Women cannot play golf before 11:30 a.m. on Saturdays.

i. **Suburban Club* (Pikesville, Md.)
Only men's and mixed groups allowed to play golf on Saturdays, Sundays, and holidays. (The golf course is not open to groups composed entirely of women during these periods.)

j. *Talbot Country Club* (Easton, Md.)
Women cannot use the golf course until after 12:00 noon.

k. *Woodholme Country Club* (Pikesville, Md.)
Women cannot play golf between 7:00 a.m. and noon on Saturdays or before noon on Sundays.

On information and belief these so-called "periodic discrimination" practices of country clubs are widespread throughout the State and Montgomery County.

9. I am an attorney practicing law in Washington, D.C. and I personally followed portions of the Maryland General Assembly's legislative session in 1986 during which amendments to Sections 8-213 and 8-214 of the Maryland Code, Tax-Property article, were being considered.

10. On January 28, 1986, Senators Bainum and Levitan introduced Senate Bill 483 in the Maryland General Assembly. That bill as introduced was directed towards the reenactment, as a part of Section 8-214 of the Tax-Property article of the Maryland Code, of language that would prohibit the State from making contracts for tax deferral with country clubs that practice discrimination on the basis of sex. Such a prohibition, along with two exceptions to the prohibition permitting the State to make contracts with certain types of clubs notwithstanding their membership and guest policies, had previously been struck down by the Court of Appeals in *Burning Tree Club v. Bainum*, 305 Md. 53 (1985).

11. The bill was assigned to the Senate Budget and Taxation Committee and a hearing thereon was set for February 28, 1986. Prior to the February 28, 1986 hearing, many clubs, including Burning Tree, expressed opposition to the bill, and a great number of clubs appeared at the February 28, 1986 hearing to oppose it.

12. At the opening of February 28, 1986 hearing, Senators Levitan and Bainum announced that they were amending the bill to permit the continuation of so-called "periodic discrimination" by country clubs receiving tax deferrals. The bill subsequently was voted favorably out of that committee.

13. After the February 28, 1986 hearing, Senator Levitan, one of the bill's sponsors and the Chairman of the Senate Budget and Taxation Committee, sent a letter, a copy of which is attached hereto as Exhibit B, to a number of clubs, a number of which were still opposed in principle to the bill, attempting to explain the reason for his actions on February 28, 1986. As may be seen from that letter, Senator Levitan characterized the bill as "defective" without the inclusion of the periodic discrimination provision. Further, Senator Levitan's letter indicates that he, a sponsor of the bill, was of the opinion that Burning Tree, with its contract, would not be adversely affected. He stated:

> In addition, Burning Tree still has other valid arguments, e.g., the 50-year Agreement with the Attorney General. The Club can use arguments such as this to continue to maintain its tax break.

14. During the 1986 General Assembly session, in structuring and stating its opposition to S.B. 483, Burning Tree understood the bill as being prospective only, *i.e.*, as not affecting existing contracts. The Club relied in this regard upon its own reading of the bill and upon Senator Levitan's letter.

15. I am over eighteen years of age, competent to testify and, unless otherwise indicated, have personal knowledge of the matters set forth herein.

/s/ Stephen B. Clarkson
STEPHEN B. CLARKSON

Sworn to before me this 4 day of August, 1986.

/s/ Elaine Wolaskin
Notary Public

My commission expires: 12/14/88

CLARKSON AFFIDAVIT
EXHIBIT 1

[LOGO] MARYLAND
STATE DEPARTMENT OF ASSESSMENTS AND TAXATION
Montgomery County Offices, Robert L. Rudnick, C.A.E., Supervisor

AGREEMENT

I. This Agreement between W. Theodore Pierson, President of the Burning Tree Club, Inc., herein after called the club, the address of which is Burdette and River Roads, Bethesda, Maryland 20034 and the State Department of Assessments and Taxation by Robert L. Rudnick, Supervisor of Assessments for Montgomery County, is made pursuant to Chapter 395 of the Laws of Maryland, 1965, being Article 81, Section 19(e) of the Annotated Code of Maryland 1957 (1974 Cum. Supp.).

II. The Club will provide financial data and membership date to the Supervisor in accordance with an application to be furnished by the Supervisor of Assessments. The Club further agrees to provide such additional financial data and membership data as may be requested by the Supervisor of Assessments from time to time.

III. It is understood and agreed that the Club has the option to withdraw from this Agreement upon receipt from the Supervisor of Assessments of the notice of the assessment for country club use and the assessment based upon full cash value, less an allowance for inflation, if in fact inflation exists.

IV. It is understood that this Agreement shall be for a period of not less than 50 consecutive years and may be extended from time to time, in accordance with subsection 5 of Article 81, Section 19(e).

V. It is further understood and agreed, by the Club, that this Agreement is prescribed by Article 81, Section 19(e) of the Annotated Code of Maryland 1957 (1974 Cum. Supp.), and that under subsections 7 and 8 of Section 19(e), deferred taxes based upon an assessment of full cash value will become due and payable in the event that the Club property ceases to be used as, or fails to qualify as, a country club, as defined in Article 81, Section 19(e), irrespective of the term of this Agreement.

AGREED to this 14th Day of April, 1981.

ATTEST: John G. Fox
JOHN G. FOX
Secretary

/s/ W. Theodore Pierson
W. THEODORE PIERSON
President

State Department of Assessments & Taxation by:

WITNESS: [Illegible]

/s/ Robert L. Rudnick
Supervisor of
Assessments for
Montgomery County

CLARKSON AFFIDAVIT
EXHIBIT 2

[LOGO]

SENATE OF MARYLAND

Annapolis, Maryland 21401-1991

March 12, 1986

Dear Country Club Manager

There was some confusion on Senator Bainum's Burning Tree bill when it came up for hearing on Friday, February 28th. The bill as originally introduced was defective in that the provisions of Section 8-214 were eliminated.

At the hearing I indicated that the language under Section 8-214 (a) and (b) should remain in the law with the exception of the provision relating to a club operating with the primary purpose of serving or benefitting members of a particular sex, i.e., Burning Tree. The bill as amended only deals with Burning Tree and will continue to permit Ladies Day, Men's Day, starting time preference. (See copy enclosed)

Over the years, Burning Tree has been the focus of legislation to affect the tax exempt status of country clubs, fraternal and sororal organizations, etc. I am convinced that if we can eliminate the Burning Tree exemption we will be able to put this entire issue to rest for many years to come. I can appreciate that this is not what Burning Tree wants, but I believe it to be in the best interest of the country clubs, fraternal and sororal

organizations in the State. In addition, Burning Tree still has other valid arguments, e.g., the 50-Year Agreement with the Attorney General. The Club can use arguments such as this to continue to maintain its tax break.

I welcome your questions and comments.

Sincerely,

/s/ Larry Levitan
LAURENCE LEVITAN

LL:TB
Enc:

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

No. 3108902

BURNING TREE CLUB, INC., *et al.*,
Plaintiffs,

v.

STATE OF MARYLAND, *et al.*,
Defendants.

SECOND AFFIDAVIT OF STEPHEN B. CLARKSON

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) To Wit:
)

I, Stephen B. Clarkson, being duly sworn, depose and say:

1. I am a member of Burning Tree Club, Inc. ("Burning Tree" or "the Club") and a member of its Board of Governors.

2. I submit this affidavit in support of Plaintiffs' Motions for Summary Judgment and in opposition to Defendants' Motions to Dismiss and for Summary Judgment.

3. I own a residence at 7101 Heatherhill Road, Bethesda, Maryland, in Montgomery County. I pay taxes on that property, as well as income and other taxes, to both Montgomery County and to the State of Maryland.

4. Burning Tree was founded on December 8, 1922 as an all-male club. From its inception, Burning Tree has

been a private club devoted solely to the game of golf. The members (through the incorporated Club) financed and now own the Club's land and facilities, govern themselves, and carefully regulate admission of new members to ensure a congenial atmosphere conducive to the pure enjoyment of the game of golf.

5. The founders of Burning Tree were men who were also members of conventional family country clubs. The purpose of the Club's founding was the establishment of a different type of club, formed of a congenial group of men, devoted solely to the game of golf. That remains its purpose today. No woman has ever been a member of Burning Tree or played golf there as a guest.

6. The Club's by-laws state that "[t]he facilities of the Club are for the use of members and their individual guests only." In addition, standing policies concerning the use of the Club by guests are highly restrictive. Guests may play only at the invitation of a member, who must be personally present with the guest at the Club and who is considered responsible for the guest. No person living in the Washington metropolitan area may be a guest more than twice in one month. Guests may not play golf on weekends and holidays before 12:00 noon (unless specially invited to play in the Club's Sunday Morning Breakfast Foursomes).

7. The Club is managed by a Board of Governors, normally consisting of twelve resident members, elected for staggered terms by the membership at an annual meeting. To assist the Board there are five committees of at least three members each, including a Membership Committee, which reviews proposals for membership and submits recommendations about them to the Board.

8. The Club's by-laws stated that "[t]he Club is organized and shall be operated exclusively for pleasure, recreation and nonprofit purposes, and more specifically to promote and encourage the game of golf." The Club

is not in any sense motivated by financial profit, and is used by its members for recreation and relaxation. No business or professional societies meet here. Club policy does not condone the discussion of any business matters on Club premises. A letter from the Club's President informs every new member of this policy.

9. The Club occupies approximately 225 acres, of which about 200 acres is open space. The Club's facilities consist of an 18-hole golf course and a small one-story building containing open locker rooms, an entrance hall, dining room, bar and lounge facilities, and a shower room and toilets. In one part of the clubhouse, there is also a second-floor room that has additional locker space, toilets, and a shower, and an area used for meetings of the Board. There also is a small pro shop connected to the clubhouse by a covered sideway. No dances, weddings, or like social events are conducted at the Club. There are no tennis courts, swimming pools or other non-golf facilities. Breakfast and lunch are served at the Club, but regular dinners are not. The bar closes at 7:00 p.m., after which the Club premises are empty.

10. The Club's membership policies have remained consistent since its founding, and represent an attempt to keep the membership as small as possible consistent with the Club's financial stability. The by-laws from the beginning have limited membership to 250 residents and 250 nonresidents. The Club currently has 250 resident members and about 190 nonresident members. Additional members are in Honorary, Clergy and Senior categories. There are or have been white, black, Christian, Jewish, Indian, Hispanic, Chinese, Japanese and Korean members. A person cannot apply for membership but must be proposed by one member and seconded by at least one other. A member may propose no more than two persons for resident membership in one calendar year without special permission of the Board of Governors. The members proposing and seconding a candidate for member-

ship submit a form to the Board of Governors that states, among other things, the number of years the candidate has lived in the Washington area (if a candidate for resident membership), the social clubs of which the candidate is a member, the number of years the proposer and seconder have known the candidate, and the names of the other members of the Club who know the candidate. The name, residence and occupation of each candidate and the names of the proposer and seconder are posted for at least two weeks on the bulletin board at the clubhouse. The purpose of this practice is to permit each member of the Club to make inquiries of the proposer and seconder, make efforts to meet the candidate if he is unknown, and make comments to the Board of Governors about the candidate. Frequently, the proposer or seconder of a candidate will host an informal cocktail party to allow additional members to meet him. No person is admitted to membership unless approved by the Board of Governors, whose proceedings are confidential and final. In the typical case, the process of proposing and reviewing a candidate for membership takes at least a year, and often considerably longer. The decisive critteria in every case are the man's compatibility with the Club's members and his dedication to the game of golf.

11. The procedure described in the preceding paragraph results in a highly selective membership composed of men who are compatible with existing Club members and who are dedicated to golf. Only 10 to 15 new resident members are admitted in a typical year. Because members know and value the criteria for membership, they propose only candidates whom they believe to merit serious consideration; still, many more men are proposed than are admitted to membership. The Club does not advertise for members and in fact tries to avoid all publicity.

12. The Club's non-resident members (who reside more than 75 miles from the Club) make only infrequent

use of the Club's facilities. Non-resident members may not propose new members for admission; may not serve as officers or directors; pay a lower level of dues; and are not involved in the making of decisions concerning the Club's operations, including membership decisions.

13. Over one-fifth of the resident members are retired, and in recent years the average age of all resident members has been 62 to 65 years.

14. The Club has prepared its annual budgets and planned its past and future expenditures—both current and capital—in reliance on the continuation of the country club assessment for the term of the contract between the Club and SDAT.

15. Men elected to membership in the Club are informed of and required to pay the initiation fee and annual dues, which are calculated on the basis of the Club's budget. These fees and dues are substantial.

16. I am more than 18 years of age, competent to testify and, unless otherwise indicated, have personal knowledge of the matters herein stated.

/s/ Stephen B. Clarkson
STEPHEN B. CLARKSON

SUBSCRIBED AND SWORN to before me this 5 day of September, 1986.

/s/ Elaine Waloshin
Notary Public

My Commission Expires:
12/14/88

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

No. 3108902

BURNING TREE CLUB, INC., *et al.*,
Plaintiffs,

v.

STATE OF MARYLAND, *et al.*,
Defendants.

AFFIDAVIT OF WILLIAM GEOGHEGAN

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) To Wit:

I, William Geoghegan, being duly sworn, depose and say:

1. I am a member of Burning Tree Club, Inc. ("Burning Tree" or "the Club").

2. I submit this affidavit in support of Plaintiffs' Motions for Summary Judgment and in opposition to Defendant's Motions to Dismiss and for Summary Judgment.

3. I own a residence at 9612 Accord Drive, Potomac, Maryland 20854, in Montgomery County, and pay property taxes upon that property, as well as income and other taxes, to both Montgomery County and the State of Maryland.

4. I am also a member of the Congressional Country Club ("Congressional"), which is located in Montgomery County. Congressional has both male and female mem-

bers. It has over 2,600 memberships (including many family memberships that may be used by spouses and children of the member, resulting in regular usage of the club by approximately 5,000 to 7,500 people), two golf courses, many tennis courts, three swimming pools, other athletic facilities, and extensive dining and meeting room facilities.

5. Congressional has policies that result in men as well as women not being able to use parts of its facilities on a periodic basis.

6. Burning Tree is a private club devoted exclusively to the game of golf. The purpose of the Club's founding was the establishment of a club composed of a congenial group of men who were devoted to the game of golf. That remains the Club's purpose today.

7. Burning Tree Club is an intimate club where there is a unique camaraderie among the membership. Illustrative of this fact is that a great many of the members often do not arrange golf games in advance, but simply go to the club and make up games on the spot with any other members who may have arrived at about the same time, regardless of the golf handicap or playing ability of the other members. Further, on each Sunday morning, all members present are mixed together in groups of four that compete with one another. The "19th hole," where players gather after rounds to compare how they fared, is a central spot of lively banter and conviviality. The small club facility is otherwise a quiet and relaxing retreat where members can escape the cares of work and pressures of the outside world.

8. The identity and compatibility of his fellow members is of prime importance to a typical member of Burning Tree, and there exists a feeling of fraternity among the members that is seldom if ever found at family-type clubs.

9. Unlike other country clubs in the Washington metropolitan area, which publish results of weekend activities at the clubs in the Washington *Post*, Burning Tree does not give any publicity to its members' activities.

10. Substantial motivations for my joining Burning Tree and associating with the other members of the Club and, on information and belief, substantial motivations for the other members as well, were and are the factors that set Burning Tree apart from typical family country clubs, such as Congressional; Burning Tree's small size (250 resident members), its selectivity, its members' congeniality, its members' devotion to the game of golf, and its all-male membership.

11. Should the State be successful in refusing to honor its contract for tax deferral with Burning Tree, I anticipate being faced with the practical choice of paying substantially higher dues in order to continue exercising my freedom of association, or leaving the Club.

12. I am more than 18 years of age, competent to testify and, unless otherwise indicated, have personal knowledge of the matters herein stated.

/s/ Wm. A. Geoghegan
WILLIAM GEOGHEGAN

SUBSCRIBED AND SWORN to before me this 5 day of September, 1986.

/s/ Elaine Wilosken
Notary Public

My Commission Expires: 12/14/88

Supreme Court, U.S.
FILED
JUL 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1970

In The

Supreme Court of the United States

October Term, 1988

BURNING TREE CLUB, INC., et al.,

Petitioners,

v.

STATE OF MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether by extricating itself from tax-subsidized, government-sanctioned sex discrimination, the State of Maryland has abridged or unconstitutionally conditioned any association rights of a sizable and influential all-male country club which had previously agreed to serve a public function for the State and to subject its membership policies to State regulation?

2. Whether legislative reinstitution of a 1974 ban on sex discrimination by tax-subsidized and State-regulated clubs that was invalidated because it contained an unconstitutional exemption for Burning Tree Club impermissibly impairs the Club's 1981 contract with the State?

3. When the issue was neither raised nor decided below, whether the Court should entertain the question of whether a taking occurs when the State denies tax support drawn from the contributions of all its citizens to a club whose discrimination against women undermines the public function it performs?

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No. 88-1970

In The

Supreme Court of the United States

October Term, 1988

BURNING TREE CLUB, INC., et al.,

Petitioners,

v.

STATE OF MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION

The State of Maryland, et al., Respondents, for reasons detailed herein, urge the Court to deny issuance of a writ of certiorari to the Court of Appeals of Maryland to review the judgment in *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366 (1989).

STATEMENT OF THE CASE

Since 1965, the State of Maryland has permitted certain country clubs to receive a unique statutory tax benefit. Designed "to provide open spaces" and "to prevent the forced conversion of . . . country clubs to more intensive or different uses," Preamble to Chapter 399, Laws of 1965, the law authorizes the State Department of

Assessments and Taxation to enter into agreements with country clubs for an initial term of "at least ten years" and subsequent extensions of "at least five years" to reduce the assessment and taxation of their land. Md. Code, Tax-Property Article, §8-213. Under the statute, if a club enters into and abides by the agreement, its land is assessed on the basis of its use as a country club and not on the basis of its highest and best use, *viz.* as if subdivided or more intensely developed. §8-213(a).

In Montgomery County – where the greatest number of beneficiaries of the tax break are located – most clubs entered into their initial agreements in 1965 and 1966 – 11 of them within one day of each other in December 1965.[1] One such club was Burning Tree, an all-male club, self-styled as the "Club of Presidents".[2]

Even before Maryland voters approved an Equal Rights Amendment ("ERA") in 1972, Md. Declaration of Rights, Article 46, some State legislators began to question the legality and propriety of conferring a preferential tax assessment on clubs that invidiously discriminated in their guest and membership policies.

---

[1] Fewer than 25 clubs in Maryland receive the open space tax preference – a fraction of the clubs operating in the State.

[2] According to newspaper accounts, a trademark of the Club was its invitations to congressional leaders, cabinet members, ambassadors, and other high ranking officials to join the Club as honorary members or attend an annual cocktail party. *See* V. Churchville, "Burning Tree Tax Exemption Ruled Illegal", Washington Post, Sept. 14, 1984 at A1. Allegedly the first cabinet member excluded from this tradition was Ovetta Culp Hobby, Secretary of Health, Education and Welfare in the Eisenhower Administration. *Id.*

In 1971, State Senator Verda Welcome requested an opinion of the Attorney General on whether the tax preference set forth in the 1965 statute could be given to clubs discriminating on the basis of race. An opinion followed which pointed to cases whose reasoning "casts serious doubt on the constitutionality of granting tax preferences to private country clubs which practice racial discrimination." 56 *Opinions of the Attorney General* 468, 472 (1971). The following month Senator Welcome introduced legislation which would have denied a tax break to clubs that discriminate. Although the 1972 bill died, as did a 1973 measure, an anti-discrimination bill for recipients of the tax preference was enacted in 1974. Chapter 870, Laws of 1974.

The 1974 legislation prohibited certain clubs receiving the tax preference from discriminating in membership or guest privileges on the basis of race, color, creed, national origin, or sex. Tax-Property Article, §8-214. To enforce this anti-discrimination requirement, the statute charged the Attorney General with determining whether a club was engaging in any prohibited discrimination and, if a violation was found, the law triggered a process of hearings, consent agreements, and cease and desist orders that could lead to the loss of the tax preference.

Before passage of the 1974 legislation, in the closing days of the session, a last minute floor amendment was offered by a Montgomery County State Senator and adopted, adding the following language:

> The provisions of this section with respect to discrimination in sex do not apply to any club whose facilities are operated with the primary purpose, as

> determined by the Attorney General, to serve or benefit members of a particular sex nor to the clubs which exclude certain sexes only on certain days and at certain times.

At the time, Burning Tree was the only all-male club receiving a preferential tax assessment.

The new anti-discrimination law was immediately applied to clubs with existing agreements, *see State v. Burning Tree Club, Inc., supra,* 315 Md. at 266-67, and in the mid-seventies the Attorney General's Office began its investigation of all club recipients of the tax benefit.[3] Burning Tree – operating on an extension of its initial agreement – was investigated in 1977 and 1978, not only to determine whether it discriminated on the basis of race or religion, but also to determine whether it excluded women to such an extent that it was "operated with the primary purpose . . . to serve or benefit members of a particular sex" within the meaning of the exemption to the 1974 Act. On February 15, 1978, the Attorney General's Office advised the Club of its conclusion that "the facilities of Burning Tree have consistently been and presently are operated for the sole or primary purpose of serving the male sex."[4] Thus, under the 1974 statute, the

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[3] The refusal of certain clubs to cooperate in the investigation led the Attorney General to seek and obtain legislation expressly authorizing the issuing of subpoenas for members' records. Chapter 321, Laws of 1977. Tax-Property Article, §8-215(f).

[4] During the investigation, Burning Tree freely admitted that upon advice of counsel, it had deleted the references to "male" members from the club's constitution.

Attorney General's Office was able to find that Burning Tree "even though excluding women from membership and guest privileges, has not engaged in a pattern of discrimination based on sex."[5]

In ensuing years, some State legislators grew increasingly dissatisfied with the country club tax preference and the loopholes in the anti-discrimination scheme. From 1980 through 1985 more than 20 bills were introduced which would have scaled down or eliminated the tax break or toughened the law's anti-discrimination provisions.

While club legislation was being readied for introduction in 1981, various clubs in Montgomery County, including Burning Tree, apparently fearful of future changes in the law, unilaterally demanded and obtained extension of their assessment agreements for 50 years.

In 1983, the Montgomery County delegation voted to support a bill that would have removed a wide variety of tax benefits from discriminatory clubs, including Burning Tree. The Club opposed the bill, claiming it would impair its 50-year agreement with the State or "might force us into the position of becoming a rich man's club."[6] J. Feinstein, "Burning Tree Members Do Battle in Annapolis", Washington Post, April 6, 1983 at C1.[7] This

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[5] Since 1978, the Club has not been investigated with respect to any type of discrimination prohibited by the statute.

[6] In 1983, the Club's initiation fee was $12,000 and annual dues $1,700.

[7] Apparently because of this and other gaffes, *see* R. Melton, "Burning Tree Policy Evokes Bitter Debate: Blacks

(Continued on following page)

legislation passed both houses although in different versions. Because House-Senate conferees could not resolve their differences, the bill died on the last night of the Session.

After the failure of the 1983 legislation, Senator Stewart Bainum, a sponsor of past attempts to curb club discrimination, requested an opinion of the Attorney General on the constitutionality of the Burning Tree exemption. In August, 1983, the Attorney General concluded that the State was sufficiently involved in the discriminatory practices of Burning Tree to render the Club's exemption from the 1974 statute violative of the ERA. 68 *Opinions of the Attorney General* 164 (1983). Shortly thereafter, both the Attorney General and Senator Bainum brought suit against the Club. The Attorney General's suit was dismissed on standing grounds. *State v. Burning Tree Club*, 301 Md. 9, 481 A.2d 785 (1984). However, the *Bainum* suit went to the merits. On September 13, 1984, Montgomery County Circuit Court Judge Irma S. Raker declared the Burning Tree exemption violative of the ERA and severable from the remainder of the statutory scheme. She also enjoined the State from granting Burning Tree a tax preference as long as it discriminated on the basis of sex. *See Burning Tree Club v. Bainum*, 305 Md. 53, 59-62, 501 A.2d 817, 820 (1985).

(Continued from previous page)

'Don't Play Golf,' Legislators Told," Washington Post, November 2, 1983 at B1, the Club's opposition to bills in later years was funneled through paid lobbyists and associations of clubs. Until 1986, these lobbying efforts, which focused on the alleged "snowballing" effect of repeal of the Burning Tree exemption on the tax breaks of social and fraternal clubs, were successful.

On appeal, a majority of judges agreed that the Burning Tree exemption violated the ERA, but a different majority concluded that the exemption was not intended by the General Assembly to be severable from the statutory ban on sex discrimination. *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985).[8] The result of this interpretation of legislative intent was that the sex discrimination ban was eliminated and Burning Tree and all other clubs receiving the tax preference could continue to discriminate on the basis of gender and retain their tax break.

Soon after the Court of Appeals decision, Senator Bainum introduced Senate Bill 483 to reinstate the prohi-

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[8] Three judges said that the Burning Tree exemption did not involve State action and was gender neutral, but, if unconstitutional, was not severable from the statutory ban on sex discrimination. 305 Md. at 62-79. However, even these members of the Court noted that "[f]rom the standpoint of sex discrimination, Ch. 870 is nearly a complete, intrinsic contradiction. It confers a benefit on the one hand and then takes it away almost entirely on the other." 305 Md. at 83. Three other judges, on the basis of decisions of this Court, found State action, a lack of gender neutrality and unconstitutional sex discrimination. They also would have severed the unconstitutional exemption. A seventh judge (Rodowsky), whose vote decided the case, held the Burning Tree exemption unconstitutional, but not severable. *Id.* at 85-88. In the course of his opinion, Judge Rodowsky noted that the Burning Tree statute was "an unconstitutionally discriminatory anti-discrimination law" because:

> "Once the General Assembly decides to address sex-based discrimination in an anti-discrimination statute which also prohibits discrimination on other bases, the E.R.A., in light of its underlying policy, prevents the General Assembly from conferring lesser benefits on persons who are objects of sex-based discrimination." *Id.* at 88.

bition on sex discrimination by country club recipients of the preferential tax assessment, but without the Burning Tree exemption. Although the bill, as introduced, would also have deleted the "specific days" and "specific times" exemption not challenged in litigation, an amendment by the Senate Budget and Taxation Committee left this provision in the law. This time the legislation passed and it became law July 1, 1986. Chapter 334, Laws of 1986. Just before it took effect, Burning Tree was advised by the Department of Assessments and Taxation that as of July 1, its real property was to be assessed at "full cash value".

On June 30, 1986, Burning Tree filed suit in the Circuit Court for Anne Arundel County to challenge the constitutionality of Chapter 334 as well as the application of the statute to its discriminatory practices. Specifically, the Club alleged that the statute: impaired the obligation of a contract in violation of Article I, §10 of the U. S. Constitution (Count One); resulted in a breach of contract (Count Two); was not intended to affect the Club's 1981 agreement with the State Department of Assessments and Taxation (Count Three); violated the Equal Rights Amendment by exempting other types of sex discrimination (Count Four); and constituted a special law prohibited by Article III, §33 of the Maryland Constitution. After both sides had moved for summary judgment and less than three weeks before a scheduled hearing before the trial judge, Burning Tree amended its complaint to assert a First Amendment freedom of association claim on behalf of its members.[9]

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[9] Because the First Amendment issue was raised so late in the litigation and was not the key issue in the case, no discov-

(Continued on following page)

Following a hearing in September, 1986, the Circuit Court on July 21, 1987, rejected all of the Club's attacks except for one. Piecing together the plurality opinions in *Burning Tree Club v. Bainum, supra,* the lower court found that on its face the "specific days" and "specific times" exemption for other clubs violated the ERA; and, in addition, the court felt bound by the *Bainum* decision to find this exemption not severable from the reenacted ban on discrimination.[10]

Maryland's highest court finally put an end to Burning Tree's string of ironic judicial victories. By a 5-2 majority, the Court agreed that the remaining exemption in the open space law for the "periodic" sex discrimination of the other clubs violated the ERA, but this time held that this provision was severable from the reinstituted ban on sex discrimination that would cost Burning Tree its tax break. *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366 (1989). In so doing, the Court rejected all other state and federal claims pressed by the

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(Continued from previous page)

ery was undertaken with respect to the issue. Thus, the record does not show the extent of the Club's indiscriminate policy of currying favor with high ranking male government officials, whether club members took business tax deductions for use of club facilities, whether the asserted policy of "no business discussions" was a rule honored in the breach, or the rationale for the Club's extensive non-resident membership policy.

[10] Although *Nollan v. Calif. Coastal Comm'n*, ___ U.S. ___, 107 S.Ct. 3141 (1987) had been decided nearly a month before issuance of the Circuit Court decision, Burning Tree did not seek to amend its complaint to assert a taking claim.

club.[11] The judges dismissed Burning Tree's freedom of association challenge. They criticized the notion that the right of association extended "to a sizable, all male organization devoted to playing golf," claiming immunity "from the sort of governmental interference complained of here." 315 Md. at 283. Contrary to suggestions in the Club's petition, the Court went on to note on the basis of size, selectivity and purpose, "Burning Tree has not established that it qualifies for the intimate associational rights" described in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). In addition, the judges, relying on a long consistent line of decisions of this Court, concluded that the Club's asserted associational right to discriminate against women was not required to be subsidized with State taxes and was not being unconstitutionally conditioned. 315 Md. at 284-289. Finally, the Court held that Maryland had a compelling interest in "eliminating State supported sex discrimination" that could not have been achieved in a less restrictive manner than by enactment of the 1986 statute. 315 Md. at 289-290. Rejecting Burning Tree's impairment of contract claim, the Court emphasized that "[e]very Maryland contract entered with the State government since the enactment of the ERA" in 1972 has been subject to the constitutional ban on state-sanctioned sex discrimination,

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[11] The dissenters did not question the majority's conclusions on the federal questions raised by Burning Tree. In fact, in six years of litigation, not a single Maryland judge has seen any merit in the Club's Contract Clause and First Amendment claims. *See Burning Tree Club v. Bainum, supra*, 305 Md. at 105, n. 14.

that the 1986 statute "imposed no obligation on Burning Tree that was not imposed by valid laws and public policy in effect in 1981", when the Club's contract was extended, and that, in any event, the necessity of "elimination of state-sanctioned sex discrimination" justified any possible contract impairment. 315 Md. at 269-272.[12]

I. THE LAW IS WELL-SETTLED THAT A STATE'S DENIAL OF A TAX SUBSIDY TO A DISCRIMINATORY CLUB DOES NOT VIOLATE THE FIRST AMENDMENT OR CREATE AN UNCONSTITUTIONAL CONDITION.

Burning Tree struggles vainly to make this case the fourth private club/freedom of association decision of this Court in the last five years. *See New York State Club Ass'n v. City of New York*, 108 S.Ct. 2225 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S.Ct. 1940 (1987); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). However, Burning Tree is less private and less deserving of associational rights than any club in the *Rotary, Jaycees* and *New York Club* trilogy; the State's interest here is even more compelling than those considered previously; and in another line of cases, this Court long ago established that the government can deny a tax break

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[12] The Court of Appeals did not decide any taking Claim. The issue was not raised in burning Tree's cross petition for certiorari in the Court of Appeals, nor in its appellate brief – not even in the "Questions Presented" and citation of relevant constitutional provisions required by the Maryland Rules of Procedure. *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987) was mentioned only in a footnote as a gloss on Burning Tree's Contract Clause argument.

or funding to a discriminatory entity without running afoul of either the First Amendment or the unconstitutional condition doctrine.[13]

A. No Associational Rights

Burning Tree is neither small, selective, privately funded nor operated solely for a private purpose. It hardly "epitomizes thousands of intimate all-male and all-female clubs and other groups that have long flourished in this society." Petition at 8.

The Club is larger than those affected by governmental regulation in *New York Club* – with hundreds of non-resident and honorary members. Its tradition of indiscriminately granting honorary membership to high

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[13] Under the weight of adverse authority, Burning Tree understandably strains to remove the label of "subsidy" from Maryland's open space tax preference. In essence, the Club contends that it obtains no subsidy because the State receives "full value" from the contractual relationship, *i.e.*, Burning Tree's preservation of open space saves the State the cost of acquiring park land. However, all tax exemptions must be "justified on the basis that the exempt entity confers a public benefit," *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983). *See also* Md. Declaration of Rights, Article 15, requiring a State tax exemption to serve a "public purpose". Thus, all tax exempt entities could argue that they give the government "full value". This certainly would not mean that the State is not suffering a direct loss of tax dollars otherwise due or that its taxpayers are not shouldering a burden because of the tax break. *See Bob Jones University v. United States, supra*, 461 U.S. at 591 ("When the Government grants exemptions or allows deductions, all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'.").

governmental officials cuts against the Club's assertion that it does not permit the mixing of social and business matters – an allegation the Court of appeals refused to accept uncritically. *See* 315 Md. at 281.

In addition, the Club is a longstanding participant in a unique State statutory program. All country clubs receiving the tax preference exercise a government function in the preservation of open space. *See Rotary Club, supra,* 107 S.Ct. at 1946 (The public purposes behind the club's service activities "do not suggest that kind of private or personal relationship to which we have accorded protection. . . ."); *Evans v. Newton,* 382 U.S. 296, 301 (1966) ("The service rendered even by a private park . . . is municipal in nature."). And, in exchange for receiving substantial tax breaks, they are heavily regulated. State authorities have investigated and must investigate the membership and guest policies of these clubs and even have subpoena powers to examine club membership data. Indeed, when Burning Tree agreed to participate in the open space program decades ago, it surrendered its ability to exercise selectivity in membership on the basis of race, color, creed or national origin. Its bare desire to discriminate against women is not deserving of overriding constitutional protection. *See Hishon v. King and Spaulding,* 467 U.S. 69, 78 (1984). Finally, with the acceptance of nearly a quarter-century of State tax support, the Club's alleged associational right to discriminate against women has disappeared. *See Green v. Connally,* 330 F.Supp. 1150, 1166 (D.D.C. 1971), *aff'd sub. nom. Coit v. Green,* 404 U.S. 997 (1971). In light of all these factors, clearly Burning Tree is the type of club the State could regulate within the principles espoused in *Jaycees, Rotary Club* and *New York Club.*

B. No Right to Tax Subsidy

Even if Burning Tree had demonstrated a protected right to freedom of association, it would not constitutionally guarantee its right to a tax subsidy.

The Club asserts that this case presents an opportunity for this Court to reconcile *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) with *Speiser v. Randall*, 357 U.S. 513 (1958). In fact, decisions of this Court have clearly defined the limits of the unconstitutional conditions doctrine and it is clear that the refusal of the government to subsidize discrimination with tax dollars does not violate the doctrine. The result in this case is governed by a long line of cases where this Court has held the fact that "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires State support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455 (1973). *Accord, Grove City College v. Bell*, 465 U.S. 555, 575-576 (1984); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Green v. Connally*, 330 F.Supp. 1150 (D.D.C.), *aff'd sub. nom. Coit v. Green*, 404 U.S. 997 (1981).

In *Speiser v. Randall, supra*, this Court held invalid a California law that denied a tax exemption to veterans who had engaged in advocacy of the overthrow of the United States or the state if that advocacy could be criminally punished consistent with the First Amendment. The Court assumed, without deciding, that the State could withhold the exemption on that basis, *Speiser* at 520, but found the provision invalid because it placed the burden of proof on the veteran. In the view of the Court, placing this burden on the veterans would cause them to refrain

from protected, as well as unprotected speech, and thus "produce a result which the State could not command directly." *Speiser,* at 526.

The differences between this case and *Speiser* and its progeny are striking. First, as discussed above, the State could require Burning Tree Club not to discriminate at all. Any right of association petitioners enjoy is clearly outweighed by the State's compelling interest in eliminating sex-based discrimination.

Furthermore, unlike the requirement in *Speiser,* the bar on sex discrimination cannot be said to be directly aimed at the "suppression of dangerous ideas." *Speiser,* at 519. It does not act to suppress, limit or chill speech, or to favor one viewpoint over another. *Cf. Roberts v. United States Jaycees, supra,* 468 U.S. at 623. Instead, as in other cases where the Court has held that a decision not to subsidize the exercise of constitutional rights does not impose an unconstitutional condition on that exercise, the basis for withholding the exemption is content-neutral. *See, Lyng v. International Union, UAW,* 108 S.Ct. 1184 (1988); *Regan v. Taxation With Representation of Washington, supra; cf. FCC v. National Citizen's Com. for Broadcasting,* 436 U.S. 775 (1978) (multiple ownership rules do not impose unconstitutional condition).

The Court has repeatedly upheld the ability of the Legislature to condition receipt of a government financial benefit. For example, in *Grove City College v. Bell,* 465 U.S. 555 (1984), the Court, without extended discussion, held that Congress could condition federal assistance on compliance with Title IX of the Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a), without infringing the

First Amendment rights of the college or its students. And, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court held that the state could not aid discrimination by providing free textbooks for loans to children attending schools that discriminated on the basis of race, and that withholding that aid did not violate the rights of parents to send their child to the private school of their choice. *See also, Bob Jones University v. United States, supra,* and *Green v. Connally, supra* (Both holding that denial of a tax exemption to schools that discriminate on the basis of race does not violate the First Amendment.).[14]

Even outside the area of tax subsidization of discrimination, which is definitively controlled by decisions other than *Speiser*, there is no need to reconcile a purported conflict between *Regan* and *Speiser*. *Regan* itself distinguishes *Speiser*, contrasting the denial of a tax benefit *because* a person exercises a constitutional right with the refusal to pay for the exercise of the right out of public moneys. *Regan v. Taxation With Representation of Washington, supra*. 461 U.S. at 545.[15]

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[14] The one court to erroneously accord sweeping associational rights to discriminatory clubs concluded at the same time that a state would not violate the First Amendment by removing a tax exemption for a discriminatory club. *United States Jaycees v. McClure*, 709 F.2d 1560, 1575 (8th Cir. 1983), *reversed on other grounds*, 468 U.S. 609 (1984).

[15] Under *Regan*, it is constitutionally irrelevant that it may be more expensive for the Club to continue to discriminate. 461 U.S. at 549-50. Although Burning Tree has complained loudly of the financial consequences of the loss of its tax break, one of its members, former Senator Barry Goldwater, stated that the

(Continued on following page)

Finally, if there were even the slightest bit of merit to the Club's position on unconstitutional conditions, it would call into question federal tax statutes that prevent racial discrimination by certain recipients of income tax exemptions, *see Bob Jones University v. United States, supra,* and 26 U.S.C. § 501(i), which denies a tax exemption to social clubs with a charter or bylaw that "contains a provision which provides for discrimination against any person on the basis of race, color or religion,"[16] as well as Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d, and Title IX of the Education Amendments Act.

C. Compelling State Interest

Even if the State had attempted to merely regulate Burning Tree's discrimination and had infringed on the association rights of Burning Tree members, the 1986 legislation would be justified because the State has a compelling interest in eliminating private discrimination against women. *New York State Club Ass'n v. New York City, supra,* 108 S.Ct. at 2235, n. 5; *Board of Directors of*

(Continued from previous page)

loss of the tax preference "will not make or break the club. It might make dues a little higher. . . .They should find out what the tax is, divide it by the number of members and then add that on to everyone's dues. That shouldn't be too terribly much." V. Churchville, "Burning Tree Tax Exemption Ruled Illegal," Washington Post, September 14, 1984, at A1.

[16] The social and fraternal clubs Burning Tree purports to represent are more affected by 26 U.S.C. § 501(i), which has never been challenged, than by Maryland's unique country club anti-discrimination law, which has not been emulated in any other jurisdiction.

Rotary International v. Rotary Club, supra, 481 U.S. at 549; *Roberts v. United States Jaycees, supra,* 468 U.S. 623; *Bob Jones University v. United States, supra,* 461 U.S. at 604.

Burning Tree unsuccessfully seeks to disparage this interest as regulating the membership policies of just a single club. However, because the *Bainum* decision invalidated in toto that statutory ban on sex discrimination, the 1986 reinstitution of that ban applied to *all* clubs receiving the tax preference, not just Burning Tree. More importantly, at stake here is not just a compelling interest in eliminating private discrimination. Just a few short months ago, this Court stated that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J. A. Croson Co.,* 109 S.Ct. 706, 720 (1989). The necessary byproduct of State regulation of all clubs in the 1986 statute was the elimination of State sanctioned and State supported sex discrimination. This fact, above all, makes the Maryland law immune from constitutional attack.

II. NO SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION IS RAISED BY BURNING TREE'S CONTRACT CLAUSE CLAIM.

It has been more than a decade since this Court invalidated a state law as unconstitutionally impairing the obligation of a public contract. *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). This case is a most unworthy candidate for the Court to return to the area.

The Maryland statute did not seek to retroactively impact tax years before July 1, 1986. It affected an area of longstanding State regulation and resulted in a change in the law that was clearly foreseeable before Burning Tree unilaterally extended its agreement. *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413-416 (1983). The 1986 law had its genesis in the State's attempt to comply with the 1972 Equal Rights Amendment, which clearly predated and superseded the Club's 1981 contract.

Finally, the law was justified by compelling reasons that could not be achieved by less restrictive alternatives. Burning Tree erroneously contends that the 1986 legislation was aimed solely at its tax break and not aimed at a broad and general social and economic problem. The statute at issue here reinstitutes a ban on sex discrimination for all clubs receiving the tax break, not just Burning Tree. It removes official State support of and taxpayer financed generosity to private discriminatory activities. Clearly, this is a sufficiently broad and general social or economic problem. *City of Richmond v. J. A. Croson Co., supra,* 109 S.Ct. at 720. These factors, the uniqueness of the Maryland open space/anti-discrimination statute, and the undoubted correctness of the decision below, lead to the conclusion that this issue should not be reviewed.

III. BURNING TREE HAS NOT PROPERLY RAISED A SIGNIFICANT OR MERITORIOUS CLAIM THAT A LAW BANNING SEX DISCRIMINATION UNCONSTITUTIONALLY TAKES ITS PROPERTY WITHOUT JUST COMPENSATION.

In reliance upon *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987), Burning Tree now contends that the

1986 statute has taken away its alleged property right to exclude women because it claims that no reasonable nexus exists between its maintaining of open space for the State and a ban on sex discrimination in its membership and guest policies. This contention is ridiculous.

First, this issue was not decided in the State courts below. Nor was it properly raised or argued. Burning Tree could have amended its complaint in the trial court to assert a *Nollan* claim. It could have mentioned the issue in its September 1987 cross petition for certiorari in the Court of Appeals. It could have argued a taking issue in its brief, rather than confining *Nollan* to a footnote in the course of its Contract Clause argument. It took none of these actions. Therefore, review should be denied for this reason alone. *Board of Directors of Rotary International v. Rotary Club, supra,* 107 S.Ct. at 1948; *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

Second, and more importantly, *Nollan* clearly has no application to government imposed conditions on the receipt of a tax benefit or funding. An entity seeking tax exempt status "must serve a public purpose and not be contrary to established public policy." *Bob Jones University v. U.S., supra,* 461 U.S. at 592. Burning Tree's discrimination against women is so at odds with established public policy "as to undermine any public benefit that might otherwise be conferred" through its preservation of open space. *Id.* at 592. There is a rational, if not compelling, connection between the ban on sex discrimination and the Club's participation in a tax-subsidized open space program. The Club's operation is subsidized by the tax contributions of all Maryland citizens, male and female; and half the citizens of the State are denied the chance

even to see or visit the open spaces preserved by burning Tree's agreement. The Club's comparison of its governmental function to maintaining a park is revealing. If the State totally excluded women from a public park, it would be flagrantly violating the State and Federal Constitutions. To lend its tax support to a club serving the same governmental purpose without banning discrimination is equally offensive.

CONCLUSION

The State contends that review is not necessary by this Court to consider the well-settled or unmeritorious issues pressed by Burning Tree. For all of the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1988

BURNING TREE CLUB, INC., *et al.*,
Petitioners

v.

STATE OF MARYLAND, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE NATIONAL CLUB ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE NATIONAL CLUB ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

The National Club Association respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari of the Burning Tree Club, Inc., et al.*

INTEREST OF AMICUS

The National Club Association (NCA) is a non-profit national association representing approximately one thousand private social clubs throughout the country variously devoted to golf, tennis, hunting, fishing, yacht-

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* The parties have consented to the filing of this brief *amicus curiae*. The letters giving consent were filed with the Court separately.

ing and friendship. They are united by a desire to preserve their private status and to preserve the use of their property (especially the hunting, fishing and golf clubs) for scenic, park and environmental uses. As a representative of private clubs NCA has become an advocate of private status,[1] and, as such, speaks with authority for all private clubs, members or non-members, on the Constitutional right of intimate association.

Burning Tree Club, Inc. (Burning Tree), a club with an all-male membership devoted solely to encouraging the game of golf, is a member of NCA, as are numerous other single-gender, single-purpose clubs. In addition, there are uncounted single gender clubs, fraternal organizations and other societies devoted to a range of activities and interests. Single-gender does not mean all male. As the list attached as Appendix A indicates, there are well over 17,000 women in the Annapolis area alone (not counting the thousands of women in auxiliaries of men's organizations) who have chosen to associate only with other women for sororal, musical, athletic, business, professional, community and political purposes—just as some men do. It would be difficult to find a city in America that did not have such single-gender organizations.

If Burning Tree differs from these and other clubs it is in desiring, and deserving, an extra measure of privacy. The Club was founded in 1922 by a few congenial and avid sportsmen fondly dedicated to the game of golf. They confirmed their mutual dedication by purchasing a 225-acre plot of land upon which they built a golf course. For 67 years those men and their successors have remained faithful to their charter "to promote and encourage the game of golf".

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[1] For example, NCA is a member of CONPOR which appeared as an amicus in *New York State Club Association v. New York City*, —— U.S. ——, 108 S. Ct. 2225 (1988); representatives of NCA have testified throughout the country where legislatures were considering proposals to curtail the privacy of clubs.

Consistent with that non-business purpose, the Club has shunned publicity. The entrance to its property is not even marked. Aside from the golf course itself, the Club's property contains only appurtenant maintenance facilities and a simple clubhouse. The clubhouse is so modest that two-thirds of it are devoted to essential locker and shower facilities. The small non-locker and non-shower remainder consists of an entrance hall, administrative office, small dining area and adjoining lounge. The two or three-person kitchen staff only serves breakfast and lunch, not dinner, and the entire building closes at 7:00 P.M.

The State of Maryland concluded that Club's limited facilities allow members only the opportunity to play golf and enjoy its "attendant pastimes". It also has found that accomodating women in these Spartan facilities would require substantial additions, which would, in turn, require re-configuring the golf course.[2]

Just as the Club's facilities are limited, so is its membership, with only 250 resident members, the minimum necessary to allow the Club to pay its expenses without raising dues to prohibitive levels. As the State admitted in its Answer (p. 6) to Burning Tree's Amended Complaint, Burning Tree is "a small, highly selective club composed of men who are chosen on the basis of their congeniality with one another and their devotion to the game of golf." (Amended Complaint, p. 9.) New members are selected only after they have been proposed by an existing member, and successful candidates are inevitably known by the members before they become members. The "decisive criteria" are the candidate's "com-

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[2] Affidavit of T. Eloise Foster, letter dated 2/15/78 from Jon F. Oster, Assistant Attorney General, to M. Everett Parkinson, President of Burning Tree.

patibility with the Club's members" and "dedication to the game of golf." (p. 108a.)[3]

The result is an "intimate club" with a "unique camaraderie among the membership". (p. 111a.) The Club is "a quiet and relaxing retreat where members can escape the cares of work and pressures of the outside world" and instead enjoy "a feeling of fraternity", *id.* To preserve this special atmosphere, Club policy specifically forbids business discussions (p. 107a). The state has never adduced evidence that business is transacted at the Club. Indeed, the evidence is to the contrary as neearly one-quarter of the members are retired. (p. 95a.)

The State of Maryland has found Burning Tree does not discriminate on the basis of race, color, creed or national origin. It lacks the facilities to accommodate women (Answer to Questionnaire, 5/13/75). Nonetheless, because of Burning Tree's membership practices, the State of Maryland enacted legislation purporting to void an "open space" agreement which it had signed with the club, by which the Club agreed to forego developing its property in exchange for the State's assurance that it would assess the Club's land in its actual undeveloped state. As a result, the Club would pay millions of dollars less in taxes and the citizens would receive a substantial environmental benefit.

The Maryland Court of Appeals upheld this extraordinary action in the decision for which Burning Tree seeks a writ of *certiorari.*

Given the unchallenged facts which demonstrate Burning Tree's private status, it is nearly certain that a decision contrary to Burning Tree would adversely affect NCA's members as well as the many other private clubs which are potential members of NCA.

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[3] Page references followed by the letter "a" are to the Appendix attached to Burning Tree's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

A distinctly private club, Burning Tree is entitled to the protection of the First Amendment right of free association. In unilaterally revoking a mutually agreed upon "open space" agreement because it did not like the Club's membership policies, the State unconstitutionally punished the Club for the exercise of that right. In addition, the Court of Appeals for Maryland failed to balance the petitioners' strong and substantial rights against the highly attenuated interest of the State in who plays golf on the Club's private property and enters the locker room and other areas of the clubhouse.

ARGUMENT

THE MARYLAND COURT ERRED BY FAILING TO ACCORD BURNING TREE AND ITS MEMBERS THE PROTECTION OF THE FIRST AMENDMENT FREEDOM OF ASSOCIATION.

I. BURNING TREE AND ITS MEMBERS ARE ENTITLED TO A HIGH DEGREE OF PROTECTION UNDER THE FIRST AMENDMENT OF FREEDOM OF ASSOCIATION.

The freedom of association is a First Amendment right[4] which protects non-political associations which provide "social, legal, and economic benefits" to the members. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). It is inherently necessary to make the express guarantees of the First Amendment fully meaningful. *Id.* It includes the right to join a group. *Id.*

This Court has decided two cases, *Roberts v. Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537

[4] Courts have also found authority for free association in the Ninth Amendment. *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973). *Martin v. Covington, Kentucky*, 541 F. Supp. 803 (E.D. Ky. 1982)

(1987)[5] which delineated some of the broad principles of the freedom of association, but it has not yet decided a case juxtaposing a strong claim of privacy and the attenuated interest of the State presented here.

Both *Roberts* and *Rotary* involved local chapters of large national organizations active in business and community activities. Burning Tree, on the other hand, more nearly fits the *Griswold* model of "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold*, 381 U.S. at 486.

The irony is that the *Griswold* model describes marriage, and NCA does not claim that the members of Burning Tree share a level of intimacy approaching that of spouses. Instead, NCA respectfully submits that the broad principles of *Roberts* and *Rotary* concerning business-oriented clubs do not alone provide sufficient guidance to private clubs, especially to single-gender clubs.

In *Roberts*, 468 at 620, this Court enunciated several factors ("size, purpose, policies, selectivity, congeniality" plus the "seclusion from others in critical aspects of the relationship") intended to determine where on the "broad range of human relationships", from "most intimate to most attenuated", to place a particular association of people. It did not, however, indicate how to weigh those factors.

NCA asserts that selectivity and a non-business purpose are decisive and that all other relevant elements flow naturally from that factor. For example, a truly selective

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[5] In a third case, *New York Club Association v. City of New York*, *supra*, this Court ruled that a local ordinance was not invalid on its face when the City asserted that it could be administered with sufficient flexibility to protect private clubs' freedom of association. Because the challenge did not involve an actual application of the statute, the Court did not specifically apply *Roberts* or *Rotary*.

group will choose its members on the basis of congeniality, measured both by their inter-personal agreeability and by their devotion to the purpose and policies of the group. Similarly, a truly selective group will minimize non-member use of its facilities. Because size is only relative, it offers no more real insights into the intimacy of private clubs than of families.

The group's purpose and policies are relevant only if they are business related, because just as non-commercial speech is more highly protected than commercial speech, *Valentine v. Christensen*, 316 U.S. 52 (1942), *Breard v. City of Alexandria*, 341 U.S. 622 (1951), *reh. den.*, 342 U.S. 843, presumably a non-business association is more protected than a business association.[6]

Finally, a truly selective group will naturally exclude others from "critical aspects" of its activities, such as organization and administration, which will be run by members.

Burning Tree illustrates these points perfectly. As a highly selective club, its membership is definitely congenial, small and devoted to a sport, which is a decidedly non-business purpose and policy. The State has conceded, and the record establishes, those facts. Thus, the sportsmen who comprise the Club enjoy the rare camaraderie which always grows from a small group's special dedication to a purpose which is far more important, and comprehensible, to them than to the disinterested public.

Concerning purpose and policies, the undisputed record demonstrates that the Club is devoted entirely to the game of golf, not business, and that the Club's policies discourage the conduct of business on the Club's premises. The Club's modest facilities are entirely devoted to that pastime, to the extent that the clubhouse is more locker room than anything else.

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[6] In this respect, *Breard* is also enlightening because there this Court concluded that the right to privacy enjoyed by a householder outweighed the right of commercial speech of a magazine seller.

Finally, there is no doubt that the Club excludes outsiders from its critical activities. Even its guest policy is extremely limited.

In sum, there can be no doubt that Burning Tree is a very private club fully entitled to the protections of the freedom of association. It is necessary for this Court to examine and weigh these relevant elements to reassure other similarly situated organizations of mutually devoted individuals and thus to prevent the chilling effect of other governmental threats proliferating in the wake of the *New York City* case, *supra*.[7]

II. THE MARYLAND COURT ERRED BY ALLOWING THE STATE TO PUNISH BURNING TREE AND ITS MEMBERS, BY NULLIFYING THE "OPEN SPACE" AGREEMENT, FOR EXERCISING THEIR FREEDOM OF ASSOCIATION.

In erroneously dismissing Burning Tree's claim that the State's nullification of the "open space" agreement punished the Club for exercising its rights, the Court of Appeals seriously misapplied the line of cases consisting of *Speiser v. Randall*, 357 U.S. 513 (1958), *Perry v. Sinderman*, 408 U.S. 593 (1972), *Regan v. Taxpayers with Representation*, 461 U.S. 540 (1983), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). The Court mistakenly read the first two decisions as being inconsistent with the latter two, ignoring the overriding principle for which they stand, that governments cannot punish people for exercising their rights.

First Amendment freedoms are not absolute and may be regulated under carefully controlled circumstances. See, e.g., *Wayte v. California*, 470 U.S. 598 (1985), *Cohen v. California*, 403 U.S. 15 (1971), *reh. den.*, 404

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[7] According to NCA's records, since that decision at least 24 separate statutes, ordinances and regulations have been proposed, passed or approved which would curtail the membership policies of private clubs.

U.S. 896, *United States v. O'Brien*, 391 U.S. 367 (1968), *Breard v. City of Alexandria, supra, Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), *reh. den.*, 365 U.S. 856, *Paulos v. State of New Hampshire*, 345 U.S. 395 (1953), *reh. den.*, 345 U.S. 978, *Dennis v. United States*, 341 U.S. 494 (1951), *reh. den.*, 342 U.S. 842, reh. *den.*, 355 U.S. 936. The general rule is that such regulations must be content neutral, *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *reh. den.*, 429 U.S. 873; also see, *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Any regulation of content is subject to great scrutiny, *Widmar v. Vincent*, 454 U.S. 263 (1981), *Consolidated Edison Co. of New York v. P.S.C. of New York*, 447 U.S. 530 (1980).

Consistent with these principles, the *Speiser* line of cases demonstrates that the State cannot punish those who exercise their lawful rights merely because they may be out of step with current majority thinking. In *Speiser*, this Court declared that a veteran's free speech was unconstitutionally chilled when the State withdrew a valuable tax exemption, available to all veterans, when that veteran refused to take a loyalty oath. In *Perry*, this Court ruled that the State of Texas could not fire a teacher at a State school because he had exercised his First Amendment rights by critizing school officials. In *Regan*, this Court affirmed the denial by the Internal Revenue Service of a lobbying organization's tax exempt status when that denial was content neutral and did not punish the taxpayer for the exercise of First Amendment rights. In *Bob Jones University*, this Court decided that the taxpayer had never properly qualified as a charity, so revoking its tax-exempt status was not a punishment at all.[8]

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[8] This Court's affirmance of *Green v. Connally*, 330 F. Supp. 1150 (D.C.D.C. 1971), aff'd *sub nom. Coit et al. v. Green*, et al., 404 U.S. 997 (1971), also mentioned by the Maryland Court, applied the same reasoning.

Clearly the State's unilateral nullification of an agreement worth millions to Burning Tree is a punishment of the Club for having exercised its Constitutional right of association in a manner not preferred by the State. The State has never claimed that the "open space" agreement had been improperly entered into, so the reasoning employed in *Bob Jones* to deny a tax exemption does not apply. Similarly, the reasoning used in *Regan v. Taxpayers with Representation* to revoke a tax exemption does not apply because there the government action was content neutral, whereas Maryland's legislature specifically amended its legislation in order to harm the Club because of the manner in which its members exercised their First Amendment freedom of association.

The reasoning of *Speiser* and *Perry* is definitely applicable. Both of those cases reversed adverse State action directed against the particular exercise of First Amendment rights. California's special property tax exemption could not be conditioned upon a loyalty oath; the Texas teaching position could not be conditioned upon a teacher refraining from criticizing officials. The continued validity of an existing and mutually binding "open space" agreement could not be conditioned upon a particular exercise of the freedom of association.

It was spurious for the Court to reason that Burning Tree's rights were not being infringed because it could still choose its members freely if it would forego the benefits of the "open space" agreement. That specious argument has no more validity here than in *Speiser*, where the veteran could have foregone the property tax exemption, or in *Perry*, where the teacher could have sought employment elsewhere.

III. THE MARYLAND COURT ERRED IN FINDING THAT THE STATE'S INTEREST IN DETERMINING WHO WOULD PLAY GOLF AT BURNING TREE OUTWEIGHED THE MEMBERS' FIRST AMENDMENT FREEDOM OF ASSOCIATION.

The Maryland Court completely failed to engage in the balancing of interests required whenever the State attempts to curtail First Amendment rights. Here the State's action exceeded the permissible regulation allowed by the clear standards enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which said:

> . . . a government regulation is sufficiently justified . . . if it furthers an important or substantial interest; . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The same calculus is required in determining whether the State may encroach upon a particular human relationship. The *Roberts* and *Rotary* cases focused on the human relationships and found them so distant and business-oriented that they were easily outweighed by the state's interest in eradicating discrimination against women in commerce.

A different situation is involved here. The restriction upon First Amendment freedoms is far more than incidental and neutral. The degree of intimacy is far higher than in *Roberts* and *Rotary*, and the cause of women will not be significantly advanced by playing golf at and entering the locker room precincts of Burning Tree. The State has never claimed that women are being foreclosed from playing golf elsewhere, and they are not. The State has never indicated that the status of women is reduced because they cannot play at Burning Tree, and it is not. The State has never claimed that the Burning Tree is a business club, like the Jaycees and Rotary, and it is not. It has never asserted that exclusion from Burning

Tree means exclusion from business opportunities, and it does not.

Instead the State has asserted the necessity to remove the supposed imprimatur which the open space agreement confers upon Burning Tree's policy of excluding women. No such imprimatur exists or can be implied. All that can be implied from the open space agreement between the State and Burning Tree is that the clean air, green spaces and other environmental benefits flowing from Burning Tree are as healthful and beneficial to the public as those from other undeveloped lands which are also subject to similar agreements.[9]

In callously disregarding that signed agreement, the State has set at nought the valuable constitutional rights of this small Club and its few members. In upholding that high-handed action, the Maryland Court erroneously failed to examine the State interest involved here. If it had, it would have seen that the only right is that of playing golf on private property and that the rest is symbolism. Symbolism must now bow to the very real and substantial rights of the members of Burning Tree to associate freely *in private* with whomever they please.

CONCLUSION

This Court has stated that the freedom of association is a First Amendment right and that intimate associations are thereby protected. Yet, the only guidelines provided by this Court are for the most intimate relationships of the family and the least intimate relationships of business. Between those poles are those deep, non-

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[9] It should be emphasized that the Club's lower taxes resulted from bargaining away valuable rights, not from an exemption granted out of largesse. "Valuation consistent with restricted use does not amount to an exemption." *Tarrant Appraisal District v. Colonial Country Club*, No. 2-87-224-CU, Court of Appeals, Second District of Texas (March 8, 1989), slip p. 5.

family, non-business attachments which enrich us all and which merit a high degree of protection.

The lack of guidelines allows aggressive legislative majorities to invade the privacy of the few, and even punish them, without concern for the damage which can be done. The Maryland Court failed to recognize Burning Tree's legitimate right to First Amendment protection; it failed to balance that right against the minimal State interest involved.

For the foregoing reasons, this Court should issue a writ of certiorari.

Respectfully submitted,

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National Club Association

July 5, 1989

APPENDIX A

APPENDIX A

ANNAPOLIS LODGE NO. 622

Benevolent and Protective Order of Elks
Instituted October 23, 1900
P.O. Box 1888
Rowe Blvd. and Taylor Ave.
Annapolis, Maryland 21404
Telephone: (301) 263-2891

James C. McNamara, P.E.R., Secretary
Kenneth D. Webb, P.E.R., Treasurer

February 24, 1989

Brother Edward W. Seddon
D.D.G.E.R.
9730 MCovered Wagon Drive
Laurel, MD 20707

Dear Brother Ed,

Pursuant to your February 10th request, please find the attached list of all female organizations in our area. Because of the time limitations and the reluctance of some organizations to provide all of the requested information, this list is incomplete. You may note we have not listed the auxiliary units supporting the Elks, Moose, American Legion, etc. Should you desire additional information or wish to have us expand our list, please do not hesitate to contact us.

Fraternally,

ROBERT J. CAMPBELL
Exalted Ruler

Copies to:

Brother Homer Huhn, Jr., P.G.E.R.
Brother Raymond Settler, Govt. Rel.

Enclosure

A.A. Co. Commission for Women,
94 Franklin Street
Annapolis, MD 21401
Jean Melton, Director
Commission of 16 Women

College Womens Club,
1716 Cedar Park Road,
Annapolis, MD 21401
Mrs. M. Breuneinan, President
60 Members

Women's Club of Linthicum,
317 Ardmore Road,
Linthicum, MD 21090
Mrs. Chas. West, President
200 Members

American Assoc. of University Women,
3301 Kenney Ct.
Edgewater, MD 21037
Marion Jo Meizner, **
50 Members

League of Women Voters of MD.,
200 Duke of Gloucester St.
Annapolis, MD 21401
Priscilla Hart, President
2,900 Members

Alpha Kappa Alpha Sorority,
41 Hicks Ave.,
Annapolis, MD 21401
Mrs. Hanna Chambers, President
42 Members

Delta Sigma Theta Sorority,
Box 1647,
Annapolis, MD 21401
Ida Rogers, ***
60 Members

Y.W.C.A. of A.A. Co.,
40 State Circle,
Annapolis, MD 21401
Doloros Bail, **
12,000 Members

MD. Federation of Women's Clubs,
2104 Bay Front Terrace,
Annapolis, MD 21401
Mrs. John Crippen, President
600 Members

Frontiers Wives,
1955 Forest Drive
Annapolis Drive
Annapolis, MD 21401
Mrs. Irene Mills, **
50 Members

MD. Federated Women's Club,
Southern Dist.
8100 Canterburg Drive
Frederick, MD 21701
Mrs. R. Brust, President
300 Members

Women's Club of Annapolis,
866 Woodmont Road,
Annapolis, MD 21401
Mrs. Everett Lehmann, **
53 Members

Lioness Club,
9 Bristol Circle,
Annapolis, MD 21401
Angie Barrett, Chairperson
30 Members

National League of Penwomen,
3478 So. River Terrace,
Edgewater, MD 20895
Mrs. Geo. Jacobi, President
25 Members

Order of Eastern Star,
162 Conduit Street,
Annapolis, MD 21401
Lucille Anderson, President
250 Members

Panhellenic Club,
4 Spendrift Drive,
Annapolis, MD 21403
Mayada Ritchie, President
120 Members

Severn Town Club,
1410 Ridge Way East
Arnold, MD 21012
Janet Harringman, President
88 Members

Sweet Adelines,
Annapolis Landing,
Riva, MD 21140
Stell Emmert, **
30 Members

Business & Professional Women,
Box 45,
Annapolis, MD 21403
Edith Knight, **
200 Members

MD Association of Elected Women,
1 Newberg Ave.,
Baltimore, MD 21228
Nancy Murphy, ***
100 Members

South Arundel Club,
4909 Chalk Pt. Road,
West River, MD 20778
Mrs. Edward Atkinson, President
25 Members

South Arundel Jrs.,
5461 Greenoak Road,
Lothian, MD 20711
Mrs. William Chaney, Pres.
25 Members

SOURCE:—Local paper & Chamber of Commerce publications

** Indicates information not available

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BURNING TREE CLUB, INC., *et al.*,
Petitioners

v.

STATE OF MARYLAND, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Maryland

---

REPLY BRIEF FOR PETITIONERS

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July 11, 1989

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---

REPLY BRIEF FOR PETITIONERS

The respondents' Brief in Opposition has two principal flaws. The first is its reliance on false assertions from non-record sources to distract the Court from the undisputed facts of this case. The second is its overstatement and misstatement of the case law. This reply addresses a few examples of those flaws.

1. In this Court, for the first time, the State argues that Burning Tree is not small, selective, or private, without a single citation to the record. *See* Brief in Opposition at 12. Yet in its Answer to paragraph 33 of Burning Tree's Second Amended Complaint, the State *admitted* that "Burning Tree is a small, highly selective club composed of men who are chosen on the basis of their congeniality with one another and their devotion to the game of golf." The State had good grounds for that

admission, since it had investigated the club's policies in 1978.[1] Moreover, the undisputed record fully supports the State's admission. *See* Burning Tree's Petition for Writ of Certiorari at 9-13. The State's about-face has placed it in the comical position of relying throughout its brief on irrelevant, non-record assertions and innuendo that happen to be false in every instance—perhaps best exemplified by its reliance on a five-year-old triple hearsay newspaper account of events that allegedly occurred over thirty years ago. *See* Brief in Opposition at 2, n.2.[2]

2. The State correctly points out that there is tension between the doctrine of cases such as *Speiser v. Randall*, 357 U.S. 513 (1958) and *Perry v. Sindermann*, 408 U.S. 593 (1972), on the one hand, and cases such as *Norwood v. Harrison*, 413 U.S. 455 (1973), *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1981), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), on the other. *See*

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[1] The State complains for the first time in its Brief in Opposition about its decision not to take discovery into Burning Tree's members' exercise of their First Amendment rights. Brief in Opposition at 8-9, n.9. The State could have conducted discovery at any time during the eleven months between Burning Tree's assertion of a First Amendment claim on September 5, 1986, and the trial court's decision of July 21, 1987. The State's decision not to do so is an obvious reflection of the fact that its investigation of the club had convinced it that the club is highly selective and private. If the State had taken discovery it would have discovered that Burning Tree strongly enforces policies to ensure that it remains private and devoted solely to golf, as is evidenced by the excerpt from a recent version of the traditional welcoming letter sent by the club's president to new members that is printed in Appendix A.

[2] Appendix B to this reply contains an excerpt from an affidavit by James Gibbons, a former president of Burning Tree, that was filed in connection with *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985), one of the earlier attempts to force a change in the club's policies. That affidavit refutes the false, press-inspired image upon which the State rests its argument that the club is not private.

Brief in Opposition at 14-17. That tension underscores the need for review in this case. The tension arises because the latter cases, in which (unlike this case) the facts supported no right of freedom of association, contain language that can be read to suggest that a state's interest in eradicating discrimination will always prevail over a private right of association.[3] This Court should establish a clear line beyond which government may not go to coerce private parties to conform to conduct that the government deems socially desirable. The State apparently contends that in tax cases no such line exists—that a government can deny run-of-the-mill tax benefits to individuals because of political non-conformity.

3. The State continues to mischaracterize the benefits for which Burning Tree bargained in its contract as a "subsidy." Brief in Opposition at 12, n.13. Burning Tree paid handsomely—in contract terms, gave substantial consideration—by giving up its right to develop a multi-million dollar parcel in a highly desirable part of Montgomery County. The State chose to pay for that benefit by deferring the club's taxes, rather than by some other method. The basis of the contract between the club and the State was deferral of taxes in exchange for an agreement not to develop the land. No "subsidy" is involved.

4. The State argues that Burning Tree is performing a "governmental function" and has accepted "State tax support," and that therefore its members have lost their First Amendment right of association. Brief in Opposi-

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[3] The cases upon which the State relies are distinguishable in other respects. One clear basis for distinguishing them is that they involved the fundamental overriding public policy against racial discrimination in education—a far cry from Maryland's vendetta against the membership policy of a single private golf club. Moreover, as pointed out by the brief of *amicus curiae* the National Club Association, *Bob Jones* rests on a point of statutory interpretation, not constitutional law. *See* Brief of Amicus Curiae at 9.

tion at 13. That is a poorly disguised rehash of its contention in an earlier round of litigation that Burning Tree's contract makes its policies "state action." The State has already lost that claim. The Maryland Court of Appeals held in *Burning Tree Club, Inc. v. Bainum*, 305 Md. at 75-76, 85, 501 A.2d at 828, 833 (1985) that "Burning Tree is not a 'state actor' ".[4]

5. The State argues that Burning Tree's claim under the Contract Clause does not merit review because the State's present desire to abandon its obligations was somehow "foreseeable" in 1981 when the club and the State voluntarily entered into a new contract. Brief in Opposition at 18-19. That assertion is without factual support or record citation. Even if it were true, however, the main reason that parties enter into binding contracts is to allocate risks—including the risk that the other party will decide that it does not wish to perform. The State's cavalier attitude toward its contract with Burning Tree emphasizes the need for this Court to affirm that a state may not walk away from a contract simply because it is politically advantageous to do so. That need is particularly great in this case, in which Burning Tree may still face a retroactive, contract-imposed penalty of having to pay taxes deferred during prior years if it decides to sell its property. *See* Md. Tax-Property Code Ann. § 8-216(c).

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[4] The State also contends that Burning Tree somehow "surrendered" its members' right to freedom of association by contracting with the State to provide open space, even though every contract that Burning Tree has signed has *permitted* its policy of allowing only men as members and guests. *See* Brief in Opposition at 13. If the State's longwinded recitation of Burning Tree's resistance to attempts to force it to change its policies (*see* Brief in Opposition at 2-8) proves anything, it proves that Burning Tree has always vigorously preserved and defended its members' right of freedom of association, and has steadfastly resisted the State's attempts to take that freedom away. That is far from the "knowing" and "voluntary" conduct required to waive constitutional rights. *Brady v. United States*, 397 U.S. 742, 748 (1970).

6. The State's argument that this Court should not review its taking of Burning Tree's property rights under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Brief in Opposition at 19-21) ignores two fundamental points. First, the taking issue is purely legal, and all facts necessary to decide it are before this Court. Second, in its brief to the Maryland Court of Appeals, *its first filing on the merits after Nollan was decided*, Burning Tree squarely raised the taking issue in the following language:

> The State is attempting to require Burning Tree to admit women as a condition to receiving an open-space tax deferral, even though the First and Fourteenth Amendments prevent the State from *directly* requiring the club to admit women. The recent Supreme Court case of *Nollan v. California Coastal Commission*, —— U.S. ——, 107 S.Ct. 3141 (1987), shows that the State cannot do this *for an additional reason.*
>
> * * * *
>
> *Nollan* makes clear that even in those situations when the Constitution might allow the State to impose as a condition to the receipt of a benefit something that it could not require directly, it still prevents the State from imposing the condition when that condition has no connection to the purpose for which the State grants the benefit. In this case, the purpose behind the tax deferral is the provision of open space, and the State could deny the tax deferral outright if a club does not provide open space. Requiring a club to admit women, however, does not further the purpose of providing open space. Therefore, under *Nollan*, the State cannot require Burning Tree to admit women as a condition of receiving the tax deferral. (Emphasis added.)

That is the same argument that Burning Tree is making in this Court.

CONCLUSION

For the reasons stated herein and in Burning Tree's Petition for a Writ of Certiorari, this Court should issue a writ of certiorari to review the decision of the Court of Appeals of Maryland.

Respectfully submitted,

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July 11, 1989

APPENDIX A

EXCERPTS FROM LETTER FROM PRESIDENT TO NEW MEMBERS

* * * *

We try to have only so many rules as will help us to avert sheer chaos. It must be borne in mind that we are a completely private Club—existing only for the pursuit of golf and its attendant fellowship—and only Members and their guests may use the Clubhouse and Course.

Let me emphasize that we have strictures on the conditions and circumstances under which guests may be invited to use the Club's facilities.* Other pertinent provisions from the By-Laws relating to guests are set forth in the Club Membership Book, and I strongly urge you to familiarize yourself therewith to save you and the Club from even any appearance of embarrassment. Also, please bear in mind that, in keeping with the spirit of Burning Tree, guests should be invited solely for social purposes.

We pride ourselves on the fact that Membership in the Club is *personal*—we have no corporate or business memberships, stated or unstated, formal or informal. Position, status, rank, prestige—all are shed at the front gate, and, in return, every Member is assured that he will not be imposed upon in any manner while he is at the Club or by reason of his Membership in the Club.

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* For example, Section 6 of the Article XIII of the Club By-Laws provides: "No person shall be invited to be or shall be a guest at the Club more than four times a year. This provision may be waived by the President or the Chairman of the Membership Committee with regard to a person whose nomination for membership has been completed and filed with the Chairman of the Membership Committee."

Section 8 of the same Article provides: "A Member desiring to invite more than three guests at any one time shall obtain the prior approval of the president, or in the absence of the President, the Vice President.

Lobbying, soliciting, and conducting business, and any conduct that remotely suggests any of these activities, are altogether inappropriate at Burning Tree. Any lack of adherence to this standard of conduct is completely inconsistent with the purposes of the Club, and may constitute the basis for disciplinary action by the Board of Governors, including, in appropriate cases, expulsion from the Club.

* * * *

Passing on to other maters, let me strongly encourage you to participate in the Sunday Morning Breakfast Foursomes. This unique institution will quickly expose you to a large number of Members and accelerate your full enjoyment of the Club.

Also, if you have not already done so, I urge you to make yourself known to Kevin Danmeyer, the Club Manager, and to Max Elbin, our Golf Professional, and to their staffs. Because of our small membership, the patronage of the Members is quite meaningful to the financial well-being of the Club. Accordingly, I hope you will give the dining room, the nineteenth hole, and the pro shop your complete support.

We shall rely on your sponsors to orient you to the ways of the Club, but please do not hesitate to speak with me or with any other Member of the Board if you need any assistance in this regard.

I am sure by now you have become a true participant in the spirit of Burning Tree and I hope you have as much enjoyment therein as I have had for many years. There is no other Club like it.

APPENDIX B

EXCERPT FROM AFFIDAVIT OF JAMES GIBBONS DATED DECEMBER 22, 1983

Over the years a false image has developed of Burning Tree as "the Club of Presidents," because it has been reported that every President since its founding has been a member. It has also been stated in the press on numerous occasions that every Supreme Court Justice until Justice O'Connor's appointment was extended an invitation for membership, and that all male Cabinet officers are extended invitations. All of these statements are not only incorrect, but are bottomed on fundamental misconceptions regarding the Club's membership policies and practices. The Club's by-laws state that four officials *may* be elected as honorary members: the President, the Vice-President, the Chief Justice, and the Speaker of the House; and that such other persons *may* be elected as honorary members "as in the judgment of the Board of Governors have rendered outstanding special service to their country or the Club." Pursuant to these provisions, *some* Presidents, Vice-Presidents, Chief Justices and Speakers have been made honorary members. The last President to have been a member was Gerald Ford, who was a member before becoming President. Supreme Court Justices are not routinely made members. (In the last twenty years, only two active members of the Court have been members of the Club.) Some federal officials, including some Senators and Congressman, have been elected members. The decisive criteria in every case, however, are the man's dedication to the game of golf and compatibility with the Club's members, not his status.